

Saving Entrepreneurs, Saving Enterprises: Proposals on the Treatment of MSME Insolvency



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Insolvency

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Foreword



In the aftermath of the Asian financial crisis, the Financial Stability Board mandated the World Bank Group to identify and develop internationally recognized best practices for assessing effective insolvency and creditor rights systems. In response, in 1999, the World Bank Group organized the Insolvency & Creditor/Debtor Regimes Task Force (ICR Task Force) comprising more than 70 leading international experts. The ICR Task Force informs the World Bank Group's role as a joint standard setter (together with the United Nations Commission on International Trade Law (UNCITRAL) in the field of insolvency and creditor/debtor rights. Since 2001, the principles developed by the Task Force have been applied in the World Bank's assessments of country insolvency systems and the provision of technical assistance. These principles have been periodically revised and updated to reflect evolving best practices, and new or emerging areas of insolvency of particular concern to the World Bank Group's member nations.

Expanding on the discussion of the first report, *Report on the Treatment of MSME Insolvency*, published in 2017, there is increasing recognition that addressing the needs of insolvent micro, small, and medium enterprises (MSMEs) is vital for economic growth. For instance, formal MSMEs employ more than one-third of the world's total labor force, and generate economic value, representing around 52 percent of private sector value added on a global scale (World Bank Group Policy Research Paper 5538, 2016). Accordingly, many governments and regional trading blocs around the world are currently examining policies to address this large but fragile group of economic actors to maximize value preservation and facilitate market exit where necessary.

MSMEs can vary in size and encompass a wide spectrum of businesses, including sole proprietorships. They face varied challenges, as evidenced by the \$5.2 trillion funding gap for formal MSMEs and the \$2.9 trillion funding gap for informal MSMEs (IFC 2017), which are inextricably tied to the World Bank Group's agenda for promoting financial inclusion. The World Bank Group's Finance, Competitiveness and Innovation (FCI) Global Practice helps develop credit infrastructure to assist MSME entry, growth and exit, and the role of insolvency regimes is considered key in promoting both entrepreneurship and financial sector stability.

The *Report on the Treatment of MSME Insolvency* arose from a panel presentation that took place during the 2015 meeting of the ICR Task Force and subsequent discussion among Task Force members in 2016. It aimed to identify the specific challenges that insolvent MSMEs face and to provide analysis of how legislation in a number of jurisdictions aims to address these challenges. This latest report on *Proposals on the Treatment of MSME Insolvency* seeks to expand on this earlier discussion by putting forward concrete proposals for standard-setting or best practices in designing MSME insolvency regimes. Specifically, it identifies the importance of a discharge for natural person MSMEs, and of a simplified restructuring regime for all MSMEs, regardless of legal form. It also further develops the empirical research, providing a historical account of the evolution of MSME insolvency regimes in numerous jurisdictions along with lessons learned.

This report has been developed under the leadership of Antonia Menezes (Co-Chair of the ICR Task-Force), with extensive technical research and significant support from Professor Jason Kilborn (John Marshall Law School (Chicago) and Van der

Grinten Chair in International and Comparative Insolvency Law at Radboud University Nijmegen in the Netherlands).

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Background

Following deliberations on the importance of developing insolvency regimes that address the needs of insolvent micro, small, and medium enterprises (“MSME Insolvency”), the World Bank Group Insolvency and Creditor/Debtor Regimes Task Force (“ICR Task Force”) established a Working Group on the Treatment of MSME Insolvency.

The Working Group published the *Report on the Treatment of MSME Insolvency* in 2017¹ (MSME Insolvency Report), which sets out several findings regarding the key challenges surrounding MSME insolvency, namely:

- **Complex insolvency systems**, which deter MSMEs from resorting to formal procedures to tackle financial distress;
- **Creditor passivity**, where creditors have few incentives to deal with MSME debtors through legal processes. Unsecured creditors generally have limited participation in the process and secured creditors typically focus on enforcement of security at the first sign of financial distress, often leading to lost efficiencies in the system;
- **Lack of information about MSME debtors**, as good records and reliable financial information often do not exist or are limited regarding MSMEs, making it harder to assess business viability and discouraging creditor trust in the MSME debtor;
- **Post-insolvency financing**, where many insolvency systems do not permit or incentivize financing after formal insolvency proceedings are filed, even though such financing is typically vital to MSME survival;

- **Insufficient assets to fund a formal insolvency procedure**, given that MSMEs often lack the resources to cover the costs and fees for a formal insolvency procedure;
- **Commingling of personal debts**, as MSMEs are often financed with a mixture of corporate debt and personal debt taken on by the entrepreneur (potentially including personal guarantees as well), which may result in severe consequences for entrepreneurs and their families, including social stigma; and
- **Natural persons operating as enterprises**, as many MSMEs might be informal entities that have not been incorporated, such as sole proprietorships, and in many jurisdictions, are therefore subject to the same insolvency regime as natural persons, potentially putting both the business and personal affairs of the debtor-entrepreneur at risk.

Accordingly, the ICR Task Force reached the following conclusions, set out in more detail in the MSME Insolvency Report:

- Any definition of “MSME insolvency” should not be overly prescriptive, because of the varying definitions of MSMEs around the world;
- As a starting point, consideration should be given to addressing the particular issues that arise in the case of MSME insolvency through specific MSME provisions in the existing insolvency frameworks; the ICR Task Force members did not recommend establishing separate regimes for MSME insolvency at this stage, but they acknowledged that further investigation into this topic was needed;

- Since the majority of MSMEs facing insolvency are more likely to go into liquidation rather than reorganization/restructuring (by virtue of their size), frameworks should not only focus on reorganization/restructuring, but should also consider expeditious liquidation mechanisms;
- Due to the lack of sophistication on the part of MSMEs, jurisdictions should consider providing out-of-court assistance to MSMEs, such as mediation, debt counseling, financial education, or the appointment of a trustee (although funding such assistance would require further consideration);
- Further exploration is needed between the intersection of personal insolvency frameworks and MSME insolvency; and
- Further exploration is also needed to determine if it is advisable to revise some of the World Bank ICR Principles to provide specific guidance for dealing with MSMEs.

Concurrently, the issue of MSME insolvency is being considered in more depth by the United Nations Commission on International Trade Law (UNCITRAL). Specifically, at its 47th session (2014), the Commission gave Working Group V (Insolvency) a mandate to undertake work on the insolvency of MSMEs as a next priority, and at its 49th session (2016), the Commission noted the importance of MSME insolvency and the wide support that had been expressed in the Working Group in favor of exploring that topic. The Commission clarified Working Group V's mandate

as follows: *“Working Group V is mandated to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time, based on the nature of the various solutions that were being developed.”*²

In light of the conclusions in the MSME Insolvency Report and the mandate of UNCITRAL's Working Group V to consider MSME Insolvency as its next priority, this report aims to advance the discussion on MSME Insolvency by considering possible proposals for treating the rescue and rehabilitation of MSMEs (“the Report”). The Report is discussed in the context of other proposals for the treatment of MSME Insolvency and, at this stage, does not aim to be prescriptive nor examine processes on a granular level. It does aim, however, to advance the discussion beyond merely simplifying corporate insolvency proceedings for MSMEs, by identifying core concepts and principles that any MSME insolvency regime should enshrine.



Executive Summary

This Report refines and expands on the earlier deliberations of the ICR Task Force regarding the optimal approaches for treating MSME insolvency. As a matter of terminology, it should be stressed that the term “MSME” in this Report is intended to cover both individual natural persons and juridical business entities, unless specifically stated. As detailed in the earlier MSME Insolvency Report of 2017, the term “MSME” has different definitions depending on the context and location in which it is used. This means that the size of an MSME differs from country to country and even industry to industry, making comparisons between jurisdictions and global standard-setting difficult. Whereas the Report recognizes that the definition of MSME is a policy decision that must be rooted in the relevant domestic context, it aims to identify aspects of insolvency regimes that impact MSMEs however defined, whether as an individual natural person operating as an entrepreneur of a business or a juridical business entity. That said, it is acknowledged that the Report’s proposals are most likely to apply to micro and small enterprises on the MSME spectrum (and representing the bulk of MSME entities), with the rationale being that many medium-sized enterprises are more likely to be complex and sophisticated enough to warrant the more thorough treatment offered by the general corporate insolvency framework.

Micro and small enterprise insolvency is particularly likely to impact not only the business, but also the personal and family life of the owner-operator(s) of such businesses, raising particular concerns that apply much less frequently in the context of corporate insolvency. All too often the businesses operated by these entities end in liquidation due to complex, costly, and unpredictable procedures,

lack of available financing, and creditor apathy, among other problems. Liquidation regimes in many countries offer natural person entrepreneurs no relief from debt not covered by liquidation proceeds, or they impose severe restrictions on access to such relief or on the entrepreneur’s continued business activities, thus suppressing the future entrepreneurial contributions of these individuals. Addressing insolvency policy in cases where the characteristics of the business and the person operating it are largely overlapping, and at least closely tied together, is of particular concern given the multitude of such businesses worldwide.

The scope of this Report is designed to be nonprescriptive and dynamic across countries and contexts. It proposes that an optimal MSME insolvency regime, applicable in the broadest range of countries and contexts, should include the following two main components: (1) a liquidation-and-discharge regime for natural person entrepreneurs and (2) a simplified, creditor-controlled restructuring regime applicable to both natural and juridical persons. Accordingly, this Report aims to consider rescue and restructuring for all viable MSMEs, with the objective of preserving individual entrepreneurial initiative, including in the context of liquidation, and of preserving businesses that can continue to operate and add value in an economy.

In line with the Task Force’s recommendations, the Report examines liquidation, but specifically with an eye toward its function in rehabilitating natural person debtors engaged in business. By undertaking significant empirical research and tracing the historical concept of discharge, the Report aims to illustrate how the rehabilitation of indebted natural persons through a process

concluding with discharge relief has become the most common and seemingly effective approach to promoting entrepreneurship and innovation in any given economy. Effective liquidation-and-discharge regimes provide open access to over-indebted entrepreneurs, leading to broad discharge relief in the absence of substantiated objections by creditors or an insolvency administrator identifying fraud or other debtor misbehavior. They do not distinguish between personal and business debt, providing a broad discharge to both types of indebtedness in exchange for carefully controlled expropriation of the current assets and perhaps future disposable income of debtors, with minimal formalities and few if any restrictions on future activities by debtors in all but exceptional cases.

Liquidation is not the only viable option, however, and this Report does not intend to suggest that liquidation-and-discharge is to be preferred over a business rescue option. The empirical reviews set out in this Report reveal that, where a rescue option is viable and desired, some approaches to MSME restructuring have been markedly more successful than others. In light of the institutional challenges and the costs involved, this Report concludes that a simplified, largely out-of-court restructuring procedure subject to ultimate creditor control is the preferred option in most contexts. Moreover, taking into account the similarities between smaller juridical entities and natural person entrepreneurs, this Report concludes that the same simplified restructuring procedure should be available to both natural and juridical persons, subject to requests initiated by creditors or insolvency administrators to convert such cases to full corporate reorganization procedures where the complexity of the case so warrants.

This Report's empirical reviews also re-emphasize that both effective liquidation-and-discharge and restructuring regimes rely on crucial institutional support. Particularly the restructuring alternative requires careful policy consideration and development of the appropriate gatekeeper, either individual insolvency practitioners or a specialized public body charged with insolvency administration. Many key issues in both liquidation-and-discharge and restructuring regimes depend on an effective institutional structure. Among the most notable of these issues is the efficient and effective prevention of fraud and abuse by debtors, creditors, and other parties, which all but requires a carefully selected insolvency professional or other system administrator. This Report is only able at this point to flag this critical issue without coming to any particular conclusions or making specific proposals. This is a matter that likely warrants further consideration in the Task Force's future work on MSME insolvency.

The final section of the Report starts the process of examining the ICR Principles in light of the proposals made in this report. In this section, the recommended approach is that a new ICR Principle be developed addressing the main features of an MSME insolvency regime. However, the alternative would be going through the ICR Principles, one by one, with the objective of adding language specific to MSME insolvency.

The empirical research undertaken in this Report has been done via desk-top research with key consultations from leading practitioners in specific jurisdictions. The jurisdictions examined here were selected because they have relatively recently implemented the concepts examined, seeking specifically to support the treatment of small business insolvency, and therefore have generated data and lessons learned that can usefully contribute to the discussion on MSME insolvency.



Acronyms and Abbreviations

CRA	The Japanese Civil Rehabilitation Act of 1999
CVA	Company Voluntary Arrangements
FSAP	Joint IMF-World Bank Financial Sector Assessment Program
FW	<i>Faillissementswet</i> (Netherlands Bankruptcy Law)
IAIR	International Association of Insolvency Regulators
ICR	Insolvency and Creditor/Debtor Regimes
INSOL	International Association of Restructuring, Insolvency & Bankruptcy Professionals
IP	Insolvency Professional
IRP	Individual Rehabilitation Proceeding (Republic of Korea)
IVA	Individual Voluntary Arrangement (England & Wales)
MSME	Micro, Small and Medium Sized Enterprises
NBRC	National Bankruptcy Review Commission
NPL	Non-Performing Loan
OHADA	Organization for the Harmonization of Corporate Law in Africa
ROSC	Reports on the Observance of Standards and Codes
SRP	Summary Rehabilitation Proceeding
SSD	Small-Scale Debts
UNCITRAL	United Nations Commission on International Trade Law
WSNP	<i>Wet Schuldsanering Natuurlijke Personen</i> (Netherlands Law on Debt Adjustment for Natural Persons)





Introduction

MSMEs form the majority of enterprises in most economies, and having insolvency laws that serve their needs is accordingly an important consideration. In both developed and emerging economies, MSMEs face a high failure rate, as discussed in more detail in the MSME Insolvency Report. Even in resource-rich, robust markets like the European Union and the United States, about half of all businesses fail within five years, rising to two-thirds by year ten, and the failure statistics can be even starker in emerging markets.

The collapse of an MSME business is different from that of a larger business entity. First, the company's and owner's identities are often not clearly distinct, either because of personal guarantees given by the owner, thereby commingling personal and business debt, or because as a matter of legal form, the enterprise is in fact one or more natural person entrepreneurs who bear unlimited liability for business debts. Moreover, the brand, goodwill, and customers of an MSME may be tied to the identity, family, history, and personal affinity networks of the entrepreneur-owner. Most important, a salient difference between MSMEs and larger business entities is a lack of resources, which can preclude reliable recordkeeping and the ability to adequately disclose financial information, and prevent effective negotiations with creditors. Likewise, MSMEs often have few, if any, assets to sell to provide a distribution to creditors.

For individual natural persons, MSME insolvency usually requires legally imposed relief from a debt overhang to rehabilitate the entrepreneur's productive energies. Even if the MSME operates through a formally incorporated entity, the owners or directors of such entities are

often required to take on or guarantee business debts personally in service of the business. Discharging this debt is a necessary step to allow such individuals to become economically productive again. Securing voluntary release of this debt, even in part, has proven to be an all but insurmountable challenge for individual MSME operators. When significant value is available to engage professional support and to offer creditors a substantial dividend, restructuring negotiations can be successful, but the numbers of successful cases have paled in comparison to the failures for many reasons, including those identified in the MSME Insolvency Report. A legally imposed exchange of discharge-for-wealth-relinquishment has been the most common and effective approach in recent years to reinvigorating failed individual entrepreneurs.

When the business remains viable, MSME cases generally require fundamentally less complex restructuring procedures. Corporate entities effectively confer on their owner-operators an advance discharge of unpaid debts in case of business failure, by virtue of the limited liability shield. Accordingly, court-imposed liberal discharge is neither necessary nor generally available to corporate entities.³ Given the relatively low stakes involved and the variety of impediments on the path to semi-voluntary restructuring, as identified in the MSME Insolvency Report, MSME juridical entities also require both less complex procedures and more support in establishing compromise workouts. Such plans should be creditor (as opposed to court) controlled, adopted by vote of a majority of participating creditors, with required secured creditor approval of plans that affect their rights. The rights of individual dissenting (or absent) creditors should be protected by the ability

to object on specific, objective grounds ensuring fundamental fairness. It is acknowledged that other forms of restructuring, such as purely out-of-court negotiated workouts, might also be effective in the MSME context. However, such workouts generally fail in the absence of substantial value to be offered to creditors, and most MSMEs facing insolvency lack such value. The Report's current focus is on proposing a hybrid regime as a model that might effectively work in jurisdictions where purely out-of-court restructurings are unlikely and/or unfamiliar.

The following sets forth a proposal for a framework for effective treatment of MSME insolvency, regardless of the legal form of the business, for possible incorporation into the ICR Principles. The basic aspects are as follows:

- Access to a process of liquidation and discharge of the natural person entrepreneur's unserviceable debt is the essential foundation for rehabilitating MSMEs facing insolvency;

- For MSMEs wishing to preserve non-exempt business assets, creditor-controlled but simplified procedures for restructuring should be an available alternative to liquidation;
- Juridical entity MSMEs should access the same simplified restructuring procedures as natural person MSMEs, with the possibility for creditors or an insolvency administrator to request transition to corporate reorganization proceedings in complex cases; and
- Institutions specifically skilled in and dedicated to MSME insolvency should administer the MSME-specific process.

Each of the following sections explains one aspect of this proposal and is supported with historical and empirical research.



Discharge for the Natural Person Entrepreneur as a Primary Goal of MSME Insolvency

Without intimating a policy preference for this option, liquidation-and-discharge proceedings should be a primary feature of MSME insolvency in light of the fact that so many MSMEs are natural persons, have different goals and needs in comparison to juridical entities, and are most effectively rescued by an expeditious discharge and business fresh start. Currently corporate insolvency's goal is to provide a maximum return to creditors, whether through restructuring or liquidation. Whilst this remains a goal for MSME insolvency, policy-makers are increasingly recognizing that offering relief to entrepreneurs is a parallel goal that most effectively reinvigorates MSME business. The bulk of MSMEs are in fact natural persons with unlimited liability, operating, for instance, as sole proprietorships.⁴ Even for entrepreneurs operating via limited liability legal entities, the liability shield is often porous, especially for MSMEs. Voluntary creditors often require individual entrepreneurs to bind themselves to their business entities' contractual debts, usually via personal guarantees. Likewise for involuntary creditors (tort/delict/tax), doctrines for piercing through the liability shield expose individual entrepreneurs to liability for corporate obligations, and such doctrines are especially likely to apply in the case of closely held MSME entities. Thus, country experiences have shown that the best economic result in the case of these MSMEs is to free the individual entrepreneur of debilitating debt to restore him or her as an economically productive actor. Cabining the risk of failure and reinvigorating debtor energies for the many-faceted benefit of society has become one of the principal goals of best practice standards in insolvency law, and the liberal discharge is the primary and indispensable instrument for achieving this.

The majority of MSMEs facing insolvency are most likely to be liquidated for a variety of reasons specified in the MSME Insolvency Report, and discharge relief for natural person debtors should be the automatic result of a simple and low-cost liquidation process. As was observed by the Task-Force, only a small fraction of MSMEs are likely to be able to take advantage of a restructuring regime. Accordingly, for natural person MSMEs, discharge relief should be systematically delivered, and the *quid pro quo* for this extraordinary relief collected, in bankruptcy liquidation proceedings. Such a liquidation process might even be considered a necessary prerequisite to discharge. Whilst arguments might be advanced today in favor of conferring a discharge without asset liquidation and distribution, there is also a widely held perception that it is unjustified to discharge a debtor's unpaid obligations without at least giving creditors the value to which they had access when the debtor sought relief; i.e., non-exempt property. Which items of property should be exempted from liquidation (or protected from the enforcement efforts of secured creditors, especially home mortgagees) is beyond the scope of this report and varies widely among modern states seeking to achieve various policy objectives.⁵

Providing MSME natural person debtors access to a simple, liberal discharge regime seems to be the most common denominator among states that have recently considered how to address MSME insolvency specifically and reinvigorate entrepreneurs. The Anglo-American bankruptcy systems, and many others modelled on them around the world, have long allowed former entrepreneurs a simple and efficient discharge in the context of

liquidation proceedings, often with no expropriation of future income and few restrictions on future activity. In the past three decades, new “debt adjustment” proceedings have developed, primarily in Europe, to provide a discharge to individuals, usually in exchange for a liquidation of their non-exempt assets and a multi-year plan for turning over income beyond defined exempt limits. Similarly, reforms in Asia and South America have extended liberal discharge relief to both consumers and small business debtors. Recent experiences with countries’ efforts to offer natural person MSME debtors access to an effective discharge regime are discussed further in the empirical review section below. This empirical research focuses on those jurisdictions with available data and accessible information on the implementation and operation of discharge regimes specifically targeting small business debtors, and for this reason is unable to assess many emerging markets which lack such regimes or publicize insufficient data.

Despite disagreements over detail, the trajectory around the world in jurisdictions that have recently considered these issues seems to be decidedly moving in the direction of broader, less restricted access to a discharge process, and swifter, less burdensome requirements for honest debtors to obtain that discharge. The idea of creditor control has taken a backseat to social engineering by courts and policymakers to decide on the requirements for discharge relief, even in the business context. And discharged debtors are increasingly regarded not as fiends to be marked and restricted, but as casualties of the modern, volatile global economy, to be renewed and set back upon the road to productivity.

THE ELEMENTS OF AN EFFECTIVE DISCHARGE REGIME FOR INDIVIDUAL MSME DEBTORS

The key question is how to structure discharge relief to balance the legitimate interests of creditors and maximize the reasonable rehabilitation success for MSME natural persons and the societies that benefit from their renewed efforts. Based on experiences that various countries

over time have had with MSME rescue and individual entrepreneur rehabilitation, the following central elements are proposed, and discussed in detail below:

- Open access;
- Discharge of both personal and business debts;
- Specific, substantiated challenges to debtors’ good faith in exceptional cases;
- Controlled costs by reducing formalities;
- Carefully constrained expropriation of current wealth and future income; and
- Limited civil restrictions and stigma.

Open Access

An MSME natural person should have open access to a personal discharge regime that is not limited to the debtor’s status as a “merchant” or “consumer”, but instead based on the simple criterion of personal financial distress of some identifiable degree (e.g., durable overindebtedness). The gate to such a procedure should not be barred by cost barriers or enhanced technical obstacles, such as requiring private negotiation in advance, hopeless insolvency, qualified insolvency, or other access hurdles such as minimum dividends offered to creditors. The burdens of revealing one’s debts, identifying and turning over non-exempt assets, and facing the natural stigma of bankruptcy all serve to deter abuse, and solvent debtors seldom, if ever, seek a bankruptcy discharge simply to evade claims they are able to pay.⁶ Efforts to remove barriers to access personal discharge regimes in Scandinavia and elsewhere throughout Europe have been particularly concentrated on allowing freer access to (former) entrepreneurs, as discussed in the empirical review below, and legislators in Eastern Europe have recently shaken off their original concerns with potential abuse, removing access restrictions for all individual debtors.⁷ Even in regimes that have moved to restrict access by “consumers” to a liberal discharge, entrepreneurs have been exempted from these restrictions.⁸ This is a welcome trend that has not led to widespread abuse or public disdain.

Limitations on repeat access or serial filing may be appropriate to prevent abuse, but debtors should enjoy open access at least the first time they seek relief in an insolvency procedure.

Discharge of Both Personal and Business Debts

The discharge proceeding should encompass all debts, whether related to business activity or not. It is difficult if not impossible to accurately categorize debts as business or personal in many cases, given the fungible nature of money and credit, in addition to the inevitable commingling of the personal and business affairs of an MSME individual debtor. It is preferable and likely unavoidable to treat consumers and entrepreneurs in one and the same procedure, allowing all individual debtors access to discharge relief.⁹

Exceptions from discharge should be limited. The claims of creditors intentionally omitted from the debtor's list to avoid their receiving notice, for example, can be and often are excluded from discharge. Exceptions for secured debts, as well as specific debts arising from fines and penalties and family support obligations, are also common.¹⁰ These exceptions should be carefully limited and specifically identified, however, to avoid undue erosion of the reinvigorating effect of the discharge on debtors' future entrepreneurialism.

If a society expects private creditors to compromise their claims in order to reinvigorate debtors for public benefit, tax creditors should lead by example and do the same. Tax debt and other public debt presents particular challenges, and it is often among the largest burdens on MSME individuals and sometimes the main precipitator of insolvency. On the one hand, because tax debt represents a debt to society and not simply to an individual creditor, such obligations have often been exempt from discharge in many systems. On the other hand, denying a discharge for such debts risks sacrificing the many benefits of a personal insolvency system. These benefits in the long run likely greatly exceed the foregone tax revenue and may eventually produce greater future and more

efficient tax collection. Particularly egregious cases of tax evasion and fraud can be dealt with by denying such debtors discharge entirely upon the request by a creditor or insolvency administrator. Such cases are rare exceptions and should not overshadow the vast majority of honest MSME debtors.

Specific, Substantiated Challenges to Debtors' Good Faith in Exceptional Cases

At the entry and exit points of a discharge process, the standard path should lead to automatic rehabilitation and a fresh start, but allowance should be made for insolvency administrators or creditors to raise affirmative objections and substantiated assertions of debtors' fraud or malfeasance. It is unnecessary and unconstructive to impose an affirmative obligation on debtors to prove their "good faith" to gain access to relief. Experience has shown that instances of debtor fraud and other misbehavior are exceptional and should not cast a pall over the overwhelming majority of honest debtors. Similarly, it is counterproductive and contrary to modern notions of insolvency and relief to impose restrictions on debtors' post-discharge business or non-business activities, for example, presuming that debtors who received discharge relief are not suited to serve in public office or to manage business enterprises.

If a creditor or insolvency system administrator has a reasonable basis for suspecting fraud or other misbehavior, they should be allowed to oppose the debtor's discharge, and some investigation into the debtor's affairs can and should be facilitated. Experience has shown that, even in the absence of positive financial incentives for creditor participation, there are sufficient numbers of disgruntled former business partners and former spouses willing to reveal most instances of debtors' financial skulduggery. If the standard for abuse is sufficiently defined, the administrative disruption of the few exceptional cases would be far less than a cumbersome entry criterion that must be applied and established in every case. It is inefficient to require such investigation in every case. A proper system of checks and balances is

based on an initial expectation that debtors are honest but unfortunate, backed by the ability of a creditor or insolvency administrator to pursue evidence to the contrary (an approach that might be called “trust but verify—when specifically warranted”). The UK abandonment of general restrictions and the development of specific Bankruptcy Restrictions Orders, customized to the few cases where some malfeasance warrants restrictions, under the Enterprise Act, is a model worthy of consideration, particularly in states whose bankruptcy laws mirror former English law. In countries where fraud is of serious concern, jurisdictions may opt to limit discharge to first-time bankruptcies. Heightened requirements or restrictions may be imposed on debtors seeking a discharge in a second or subsequent bankruptcy.

Controlled Costs by Reducing Formalities

The principal problems MSMEs face with insolvency proceedings today are complexity and expense. These go hand in hand, and both can and should be carefully contained in discharge proceedings. Costs imposed on former entrepreneurs in insolvency are essentially a tax on future innovation and productivity. Such costs should be minimized or eliminated, in large part simply by reducing or eliminating formalities. In the relatively simple cases of most MSME entrepreneurs, the historical formalities associated with liquidation proceedings have been demonstrated to have little purpose in the great majority of cases. Elaborate rules on public notices (especially in newspapers), meetings of creditors, and claims verification procedures achieve very little in the context of most cases where little or no value is available for distribution, or so little value that creditors rationally decide that pursuing it is not worth the expense. In such cases, recent experience demonstrates that these formalities can and should be scrapped or replaced with much more efficient electronic noticing and submission practices.

Creditors’ committees are unnecessary in most MSME cases, and generally creditors will not find participation economically worthwhile.

When the return is likely to be low, the expense and time in organizing creditors’ committees does not justify the return. Creditors will rationally decide to let small debts owed by MSMEs go, especially if there are no assets, or so few that the return will be low. If creditors have a basis for a specific objection, they can be given a voice in matters to which they so object. Waiting for objections by creditors will be more efficient in MSME cases than assuming their willingness to participate in decision-making.

In the average MSME case, a system administrator will quickly determine that insufficient value is available for significant distribution to creditors to warrant any consideration of the validity of their claims. Unless a significant distribution is expected, the investment of time and resources in evaluating claims (and investigating pre-insolvency transactions) should be carefully monitored and minimized to avoid destroying what little value is available. It makes little sense to evaluate whether claims are valid, as those subject to discharge will be discharged quickly and efficiently with no payment. If the administrator discovers value, creditors can be invited to make their claims, and the administrator can evaluate them and proceed with the case, still assuming that the creditors will only contribute to decision-making through objections, not as a matter of course.

The liquidation process should not be protracted. If a search for assets is to extend beyond a short period, the discharge should be entered while the search continues. Time is of the essence in returning MSME debtors to productive activity. Time is equally of the essence in providing whatever distribution of value might be made to creditors, who particularly in this context might also be micro and small enterprises dependent on quick resolution of outstanding receivables.

Carefully Constrained Expropriation of Current Wealth and Future Income

If debtors are to have an effective fresh start to continue their business activities, they must be left with sufficient current wealth and future

income to support their personal and perhaps business expenses. The range of property exempt from the claims of creditors is generally the same outside and within an insolvency procedure, and the widely varying approaches to this issue are beyond the scope of this Report and a matter of public policy.¹¹ Tools of the debtor's trade are commonly exempted from an insolvency estate, illustrating the already common acceptance of the notion that preserving the debtor's income-producing capacity has long been regarded as trumping the claims of creditors to the value of those assets.

The extent to which future income should be expropriated for the benefit of creditors has been a divisive policy issue and deserves especially sensitive consideration. It is quite common for modern personal insolvency systems to require debtors to apply some portion of their future disposable income to pay a portion of their legitimate debts. The determination of which cases and which amounts should be implicated have challenged modern legislators in recent years. English bankruptcy practice, for example, seems to have settled on a sensible compromise following the Enterprise Act. The practice requires payments from future income as a *quid pro quo* for the automatic discharge of unpaid debt, but only from a few debtors (averaging about 20 percent in recent years) with fairly clear excess income, and largely by agreement with those debtors based on an evaluation by the Official Receiver of the debtors' reasonably assessed disposable income.

It is counterproductive to depress debtors' incentives with ongoing payment obligations and administrator oversight, especially considering a principal goal of MSME insolvency treatment is to mobilize societal resources and reinvigorate debtors quickly into economic productivity. Practices in Europe, such as those discussed below in Germany, the Netherlands, Denmark, and Sweden, that require a long-term plan involving income supervision and expropriation, have a negative impact on current and future entrepreneurial activity. Denmark and Sweden have reduced the payment term in cases involving entrepreneurs specifically to get these debtors back to productivity

more quickly.¹² Discharge proceedings should no longer be regarded as quarantine for those suspected of having the disease of financial irresponsibility or fecklessness, but rather quick treatment for the inevitable casualties of a modern, volatile economy and encouragement for entrepreneurs to continue to take the risks that redound to the benefit of all of society.

If future income is to be collected for creditors as a prerequisite for discharge relief, it should be limited in time and carefully constrained in scope to a predictable and consistent method of assessing disposable income beyond reasonable support needs for debtors, their families and perhaps their businesses. The term of such payments should be carefully limited to get entrepreneur-debtors back on their feet with incentives for maximizing productive activity. Extended repayment terms depress debtors' incentives and rob society of their entrepreneurial contributions. Payment expectations during this term should be calculated as a function of debtors' actual disposable income in excess of a reasonable budget for debtors and their dependents and perhaps a buffer for unexpected expenses. No arbitrary minimum payment should be required, and budgets should be objectively and predictably determined. To avoid lack of consistency and a heightened administrative burden in gauging the scope of disposable income, this determination should not be left to the discretion of an administrator, be it a court or otherwise. Rather, predictable and uniform expense allowances should be developed and applied as consistently as possible across cases.¹³

Limited Civil Restrictions and Stigma

Insolvency proceedings or discharge should not result in restrictions on economic or professional activity, or other restrictions on movement. When insolvent individuals are viewed as malfeasant actors, the law may restrict them from activities such as starting new businesses, obtaining credit, or holding public office. These restrictions run counter to the goal of discharge, which is to facilitate renewed, productive economic activity by the debtor-entrepreneur. Such restrictions should be eliminated in the absence of fraud and malfeasance.

Similarly, stigma should be minimized. If debtors know that their failure will be broadcast to the community and that they will be branded with judgmental labels like “bankrupt” or, as in one unique system, “beggar without friends,” they are less likely to engage the protective system, and its benefits will be lost. Publicity of liquidation cases should be limited to the degree necessary to administer the case and provide sufficient information to enable future creditors to behave prudently in extending credit to debtors after discharge. Care should be taken to apply procedures and choose statutory language that acknowledges entrepreneurial risk, the rarity of debtor fraud and misbehavior, and the positive goals to be achieved by a discharge system.

EFFECT ON AVAILABILITY OF CREDIT FOR MSMEs

Discussions of liberally available discharge often prompt concerns about the effect this will have on the already constrained availability of unsecured credit, especially to MSMEs. These concerns have less long-term impact than might be expected. In the short term, following adoption of a more liberal discharge regime, some lenders may retrench and be more circumspect in extending credit, particularly unsecured credit to MSMEs, whose defaults would now be more certain to allow a defaulting debtor freedom from payment following a discharge. However, especially as the immediate emotional impact of a new discharge regime fades with time, at least three considerations should mitigate this concern.

First, the presence or absence of a liberal discharge regime for MSME natural persons should have little effect on the institutional lending environment, as most institutions do not lend to MSMEs due to structural concerns and risk aversion.¹⁴ The scarcity of credit to MSMEs is a function not only of creditworthiness, but of institutional lenders’ desire to avoid risk in general, not only risk of ultimate loss, but risk of default and expensive and distracting administration of distressed accounts. Whether or

not MSMEs have access to a liberal discharge in cases of extreme distress, lenders know that many MSMEs experience significant distress during their lifecycle, which interrupts the repayment process and requires expensive individualized account maintenance. Indeed, even in cases of successful loan servicing, individual loan origination costs, even if small, represent a larger proportion of small loans than larger ones, leading many lenders to conclude that it is not sufficiently economically efficient to exploit the MSME market. In light of the potential costs and the relatively small volume of profit to be gained from these loans—even if the potential profit margins are thick—many lenders simply refuse to deal with these small borrowers. For the segment of the lending community willing to deal with MSMEs, the remote possibility that some temporary defaults might turn into permanent discharge is unlikely to represent a salient additional deterrent to lending to this already high-risk segment of borrowers.

Second, the risk proposition is similar with and without a discharge regime, as a small subset of debtors will default in any case. Whether or not a conclusive discharge is available, many defaulting debtors will return to financial health and pay, but many will not. Lending losses arise from the fact that these perpetual defaulters will languish in *factual* insolvency indefinitely, not from the operation of a *legal* discharge system that conclusively establishes these debtors’ durable inability to pay. These risks are already built into the underwriting and pricing model that institutional creditors use in their lending decisions, and the addition of conclusive, legal discharge relief is unlikely to have any notable impact on this calculus. While some even smaller fraction of debtors might pay something eventually if their debts are not discharged, this remote and isolated possibility likely has very little impact on the decisions of lenders willing to lend to the MSME segment, at least in an economy with a sufficient volume of competitive lending activity. Anglo-American regimes have extended generous discharge relief to MSMEs for decades, yet these states enjoy a robust market for lending to MSMEs.

Finally, a discharge could benefit lenders in predicting losses and could result in greater, or more stable, availability of credit to MSMEs. By conclusively establishing that some debts will never be repaid, a discharge allows institutional creditors to clear nonperforming loans (NPLs) from their books by recording and moving past recognized losses. When regulated lenders are able to record default losses as final and remove NPLs from their books, they are able to stop provisioning for these eventual losses and redirect those freed-up resources for more lending. As the volume of available resources rises, competition should rise alongside, putting pressure on creditors to search further and deeper into the market for profitable borrowers, including MSMEs.

HISTORICAL APPROACH AND THE DEVELOPMENT OF DISCHARGE

For more than two millennia, bankruptcy as a legal proceeding took one form and had one major purpose: liquidation of the (individual) debtor's valuable assets in order to maximize distribution of that value among creditors. Where the word “bankruptcy” was born, early practice in medieval Italian city states, especially in the south, set a tone that would persist in Europe and beyond for centuries to come, treating insolvent debtors as scoundrels, breaking their trading benches, and banning them from engaging in productive activity.¹⁵ This process usually did not provide any relief to the debtor, leaving future income and assets subject to creditors' ongoing claims enforcement. Debtors were subjected to restrictions on activities, such as being barred from commerce or positions in government. This represented a continuation of a trend throughout most of recorded history, treating failed entrepreneurs as irresponsible sinners, sometimes as criminals, rather than victims of financial misfortune.

The first insolvency proceedings in early Roman law developed as little more than an early collections procedure for unpaid judgment creditors — a tradition that many countries followed into the 21st century. The earliest

collective insolvency proceedings developed as a single creditor executing his own judgment was forced to represent the collective of creditors to avoid depriving them of their share of the presumptively insolvent debtor's assets.¹⁶ Only an insolvent debtor would refuse to satisfy a judgment if he had the means to avoid the negative consequences (infamy, enslavement, prison) of these early enforcement proceedings.

The notion of offering insolvent debtors legal relief from the consequences of unpaid debt arose later and in limited form. Augustus Caesar instituted a proceeding (*cessio bonorum*) by which insolvent debtors could turn over their assets voluntarily and avoid infamy and potential imprisonment.¹⁷ Caesar's procedure recognized and preserved the debtor's human dignity and future potential for productive contribution to society, though it left the debtor's future value production/acquisition available to creditors. Some later European polities in northern Italy, France, and Spain embraced the *cessio bonorum* approach, allowing honest but unfortunate debtors some measure of respite, though still not a permanent discharge of debt. Nonetheless, even these relatively more humane authorities subjected insolvent debtors to humiliating rituals, such as striking their naked posteriors on a public stone or wearing a stigmatizing green cap.¹⁸

Historical insolvency regimes treated entrepreneurial risk as an evil to be avoided, financial failure a (divine) sign of character weakness or other flaw in the entrepreneur. Between the 16th and early 19th centuries, Caesar's minimally forgiving attitude toward debtors waned in Europe. Elsewhere, while Islamic Law had earlier instituted *cessio bonorum*-type procedures for freeing hopelessly insolvent debtors from jail, imprisonment rather than this limited relief remained the principal reaction to bankruptcy, and laws in Imperial China additionally subjected defaulting debtors to public beatings, as bankruptcy continued to be regarded throughout the world more as a crime than a misfortune befalling the pitiable debtor.¹⁹ Even as a more forgiving approach to debtors was revived

and discharge incorporated into bankruptcy law first in England and later in the new United States in the 18th and 19th centuries, debtors were still largely framed as malefactors deserving of suspicion if not punishment. Creditor satisfaction rather than relief to the individual remained the goal of insolvency systems, and creditors remained in charge of discharge for individuals, resulting in its sparing application.

In the 20th century, legislators in the U.S. shifted the emphasis to relief, striving to encourage risk rather than punish it, to promote economic growth. The bankruptcy law played a major role in that effort. The idea of a court-imposed, automatic discharge for individual entrepreneurs began in earnest with the adoption of the U.S. Bankruptcy Act of 1898, which extended the discharge to all natural person debtors following completion of asset liquidation. The “Old World” took another century to come around to accepting liberal discharge, spurred by the same desire to encourage risk-taking and entrepreneurial engagement.

In the UK, discharge relief expanded significantly as the Enterprise Act 2002 was adopted expressly to encourage greater entrepreneurial activity, encourage productive risk-taking, and allow small business actors to learn from their mistakes.²⁰ Effective April 1, 2004, the Enterprise Act reduced the discharge waiting period from three years to one, and enhanced the “fresh start” effect of the discharge. It lifted the most punitive restrictions on debtors’ post-bankruptcy activities, other than in isolated cases where proof of specific bad conduct might warrant a Bankruptcy Restrictions Order. English lawmakers endorsed this liberalized discharge as an indispensable aspect of insolvency policy that directly contributes to enhanced entrepreneurial activity and readiness to embrace productive risk-taking. The growing economic literature on the beneficial effects of insolvency law on entrepreneurship has a clear core message: It is the discharge for individuals, more than any other aspect of insolvency procedure, that spurs entrepreneurship and individual productivity (among past, present, and *future* potential entrepreneurs)

by shielding debtors from the adverse effects of measured (rational) risk-taking.²¹

Asimilar process of liberalization of the discharge for individual entrepreneurs began slowly but surely in continental Europe in the late 1900s. Denmark led the way with the adoption in 1984 of a new *Gældssaneringslov* (Debt Adjustment Law), which introduced into the Danish Bankruptcy Law the first liberal personal discharge law in Europe.²² Soon thereafter, a merchant discharge appeared in the French insolvency laws in 1985²³, followed by an explosion of liberal discharge laws for both business and consumer individuals in continental Europe and elsewhere in the world in the 1990s and after.²⁴ The shift toward favoring rescue and rehabilitation for both individuals and business entities received renewed impetus recently in the European Commission’s proposed directive on restructuring and a second chance.²⁵

Outside the Anglo-American world, the first step toward reinvigorating failed individual entrepreneurs has most often involved a separate liquidation-and-discharge procedure geared toward individuals, rather than modifying the business restructuring regime, which offered no discharge.²⁶ In the past three decades, new “debt adjustment” proceedings have developed, primarily in Europe, to provide a discharge to individuals, usually in exchange for liquidation of their non-exempt assets and a multiyear plan for turning over income beyond defined exempt limits. These new regimes were not controlled by creditors or voting, and they involved less complex procedures for determining which debtors would receive discharge relief and on what terms. These systems were therefore less expensive and more accessible to individual entrepreneurs, at least those who had terminated their businesses. Lawmakers have made concerted efforts in recent years to expand access to these procedures and reduce future obligations, particularly for small businesspeople.

Currently, among modern insolvency systems, cabining the risk of failure and reinvigorating debtor energies for social and economic benefit

have become primary goals of insolvency law, especially for natural person debtors like MSME entrepreneurs. The legislative histories of these laws and proposals reflect modern policymakers' recognition of the value of the personal discharge in achieving the goals of the system. While maximizing recovery on creditors' legitimate claims remains an aim of modern insolvency law, rehabilitating debtors and enabling their economic reemergence are concurrent goals.²⁷ Decades of experience has shown that debtors laboring under an unserviceable debt burden generally will not continue to expend significant effort to maximize value for their creditors. In particular, such debtors are robbed of incentive to engage in new entrepreneurial activity to produce new sources of value. They remain debilitated and immobilized, depriving not only creditors but also society of the benefits of their entrepreneurial, creative, and other productive energies. Surveys reveal that when lifelong overwhelming debt is a risk, it powerfully suppresses entrepreneurial incentive and willingness to engage risk, depressing entrepreneurship²⁸ and stunting economic growth. The orderly, liberal discharge of overwhelming debt is the primary instrument for providing a release from lifelong debt and promoting the goals of entrepreneurship and individual economic rehabilitation.²⁹

In addition, modern policymakers have increasingly recognized that insolvency law has an important role to play not only in benefitting creditors, but in disciplining them to behave more responsibly in extending and collecting on credit. As both MSME entrepreneurs and consumers have gained access to both traditional and, most often, less regulated sources of credit, their insolvency has often been hastened, exacerbated, or even caused by the high-risk and high-pressure tactics of some lenders. A well-structured insolvency system with liberal discharge forces these creditors to consider the possibility of a loss in advance of extending credit, and acknowledge a loss for hopelessly unserviceable debts.³⁰ It also limits the ability of these lenders to externalize the negative effects of high-cost credit onto the families and societies of the impacted debtors.³¹

While consensus is building among policymakers worldwide as to the benefits of a liberal discharge, considerable controversy continues to surround the notion of freeing individual debtors from their obligations without either the consent of, or a significant benefit to, creditors. Most of the benefits of discharge relief systems will flow to debtors and society rather than creditors. Creditors are understandably unlikely to agree voluntarily to internalize the costs of the negative externalities of their lending and collections activities. In light of the disciplinary effect described above, it has been clear to many modern policymakers that putting creditors in control of the debtor's discharge through a negotiation is counterproductive. Unfortunately, many other world regimes have not acknowledged this evolution of insolvency goals and the beneficial effects of encouraging reasonable risk-taking. In particular, many bankruptcy regimes around the world that are based on the English model have not followed England's (and later, Ireland's) lead in liberalizing the individual discharge process. This powerfully undermines the effectiveness of these regimes in many parts of Africa, for example, in offering solutions to failed entrepreneurs.³²

EMPIRICAL REVIEW OF MODERN DISCHARGE REGIMES FOR MSMES

The Netherlands



The Dutch began offering open access to both business entrepreneurs and consumers in 1998 through the new *Wet schuldsanering natuurlijke personen* (Law on debt adjustment for natural persons), or Wsnp. The Dutch bankruptcy law (*Faillissementswet* or FW) does not offer discharge of debt not covered by the proceeds of bankruptcy liquidation,³³ so when the Wsnp was adopted in 1998, it became a third title of the FW, offering any natural person a path to court-conferred (not creditor-conferred) discharge of both business and personal liabilities, with no limit on the volume or nature of the debtor's assets or debts.³⁴ In recent years, about 20 percent of

Wsnp cases have involved former entrepreneurs,³⁵ with higher incomes and significantly higher debt levels than their “consumer” counterparts.³⁶ These MSME debtors have fared quite well under the new relief law, obtaining a discharge after complying with the standard three-year repayment plan in over 75 percent of cases, slightly more often than in consumer cases.³⁷

One drawback of the Dutch approach, however, is that it stifles renewed entrepreneurial activity by burdening debtors with an extended period of oversight and restriction. Like most European debt adjustment laws, the Wsnp requires both liquidation of assets, most likely including those used in the debtor’s failed business, and a three-year payment plan complying with statutory requirements for turning over all “disposable” income.³⁸ The debtor is forbidden from incurring substantial new debt during that three-year term. Thus, entrepreneurs are effectively prohibited from continuing to operate their pre-Wsnp business while undergoing the relief procedure.³⁹

The possibility of a Dutch entrepreneur-debtor starting a new business during the three-year repayment period is expressly recognized, but such an action requires the explicit approval of the judge-supervisor (*rechter-commissaris*).⁴⁰ A rare, recent empirical survey of former Dutch entrepreneurs in the Wsnp process reveals that the three-year supervision process in general, and the requirement to obtain permission for new business in particular, can dampen entrepreneurial spirit. One entrepreneur complained that he was “not allowed to start up anything new thanks to the WSNP, but I’m constantly thinking about it.” Another reported he had attempted to gain permission from the judge-supervisor to launch another venture “months ago, but I’ve heard nothing since.” This same respondent expressed feelings of being “made to feel incredibly small and terribly distrusted.” One final former entrepreneur lamented that, while he thought he could cope with the three-year supervision period, “the idealism had gone, and that’s what was worst.”⁴¹ These comments reveal lost potential and missed opportunities for societal benefit from the

productive energies of these debtors, both during and perhaps long after the three-year process.

Spain



Spain provides a simple discharge to entrepreneurs, though it is subject to long-term obligations that potentially stifle entrepreneurialism. A discharge procedure specifically for merchants was established in a 2013 law “on Support for Entrepreneurs,” modified in 2015 to apply to non-merchant consumers as well.⁴² It confers an immediate discharge on individual debtors if a liquidation of their non-exempt assets covers administrative expenses, privileged claims (including 50 percent of tax claims), and a 25 percent dividend to unsecured creditors. This dividend is waived following the 2015 reform if the debtor attempted an out-of-court negotiation with creditors. However, if administrative and privileged claims cannot be satisfied in full from the liquidation proceeds, the debtor can obtain a discharge only by complying with a payment plan of up to five years.⁴³

Germany



Germany adopted an individual discharge regime to accommodate former entrepreneurs, as well, though with complex (and expensive) procedures and sometimes stricter limitations on the nature of the debtor’s income or liabilities. The first discharge provision became effective in 1999,⁴⁴ but access was limited in two ways. First, the German Insolvency Act calls for dismissal of insolvency cases when the debtor lacks available assets sufficient to cover the substantial administrative costs.⁴⁵ Along with consumers, even MSME entrepreneurs often lack sufficient funding for a formal insolvency procedure on the heels of a business collapse. The German legislature fixed this problem in a 2001 reform, allowing all natural person debtors to receive a postponement of these fees until after the end of their discharge proceedings.⁴⁶ The second limitation is that the discharge procedure must be

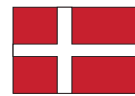
preceded by an insolvency process, either ordinary or simplified.⁴⁷ As in the Netherlands and Spain, a simplified (and much less complex and expensive) process was created for consumers. It is available to former businesspeople, but in Germany, it is further restricted to former businesspeople whose financial condition is straightforward (*überschaubar*, lit. oversee-able, comprehensible); that is, fewer than 20 creditors and no debts to (former) employees.⁴⁸ For small business people with 20 or more creditors, a full-blown ordinary insolvency proceeding is required. Such proceedings are generally more probing, more expensive, and much longer (lasting two to four years, as opposed to one year in simplified proceedings), which significantly delays the beginning of the already protracted statutory payment-plan period.

The most significant hurdle standing between a failed entrepreneur and discharge relief is an extended period of behavior control and income expropriation. The German so-called “Good Behavior Period” (*Wohlverhaltensperiode*) is among the longest discharge terms in Europe, beginning at a standard six years.⁴⁹ After a recent reform, this period is shortened to five years for debtors able to pay administration costs in full, and three years for debtors also able to pay 35 percent of unsecured creditors’ claims,⁵⁰ but such cases have been rare exceptions, as debtors in fewer than 20 percent of German personal insolvency cases have any income legally available to creditors.⁵¹ No empirical data indicate the prevalence of one or another income level or payment term among former entrepreneurs as opposed to consumer debtors.

Despite the limitations of the regime, significant numbers of (former) German entrepreneurs have benefitted from these new discharge proceedings. About 21,000 individual small business debtors (and about 80,000 consumers) have sought discharge relief each year from 2014 to 2016.⁵² The great majority (about 14,000 per year) were *former* entrepreneurs who did not qualify for simplified proceedings and therefore had to endure the longer, more expensive, ordinary insolvency process. A rising number, about 6,000 – 7,000 per year, were

former entrepreneurs with “straightforward” liabilities, who thus qualified for simplified proceedings. And as in the Netherlands, all of these former German entrepreneurs are explicitly permitted to launch a new business venture during the three- to six-year discharge period (to enhance creditor returns).⁵³ No data indicate the incidence of such serial entrepreneurship during the course of the payoff period, but the Dutch experience suggests that German entrepreneurs face the same emotional limitations in launching a new venture during—and perhaps after—this long insolvency period.

Denmark



The Danish regime was reformed specifically to embrace more former entrepreneurs. The 1984 Danish personal debt adjustment law was the first in Europe, starting a movement that would eventually lead to personal discharge laws in almost every European state. Entering new territory, Danish lawmakers were hesitant to throw open the gates too widely and undermine individual payment morality, so they imposed strict access controls on the new process. The most important one for former entrepreneurs is the requirement that debtors seeking access to discharge proceedings must exhibit “qualified insolvency.” That is, it must be objectively clear that the debtor’s foreseeable income is insufficient to service and/or retire business and personal debts in full. Entrepreneurs who intend to manage their (perhaps unpredictable) debts with unpredictable business income were thus regularly barred from the procedure.⁵⁴

After nearly 20 years of frustration with an access process that in practice rejected applications by entrepreneurs and inhibited them from starting again,⁵⁵ the Danish government launched a reform process that culminated in 2005 and eased the entryway for former entrepreneurs and shortened the plan period. A new chapter 29 of the Bankruptcy Law relaxed the “qualified insolvency” criterion for access to the personal discharge procedure expressly providing for admission of debtors with primarily business-related

debts whose economic situation is “unclear.”⁵⁶ Moreover, the payment term for a court-confirmed discharge plan (established by Justice Ministry regulation) is three years for former entrepreneurs, rather than the standard five years for consumers.⁵⁷ This shorter plan period was designed to encourage entrepreneurs to start a new venture sooner following a debt adjustment proceeding.⁵⁸

As in the Netherlands, Spain, and Germany, the Danish entrepreneur-access provisions are expressly limited to former entrepreneurs. The former business must be closed and the debtor or the enterprise must be either in or preferably just emerging from the end of a bankruptcy proceeding.⁵⁹ This restriction was specifically imposed to avoid the system’s losing legitimacy in the eyes of the public.⁶⁰ As in Germany, Danish entrepreneur-debtors are not legally inhibited from starting a new business venture once the discharge plan has been confirmed and is underway, though the strictures of the multiyear repayment plans very likely stifle both the incentive and practical ability to plan a new venture.

The Danish entry restrictions still invite courts to undertake a “reasonableness” evaluation and reject cases where “other circumstances ... speak decisively against” admission. This has resulted in rejection of over half of all applications.⁶¹ The Danish courts have taken these access restrictions quite seriously, and admissions figures have remained low over the years, though no data reporting distinguishes between personal MSME versus consumer cases. From 2006 to 2016, fewer than half of all petitions for admission to the personal discharge procedure were granted (fewer than 40 percent in each of 2009 and 2010). Moreover, of an average of just over 5,000 cases closed per year from 2006 to 2016, only about 30 percent (average about 1,680) concluded with an approved plan (though, excluding the cases rejected at the entryway, this represents a 70 percent confirmation rate for admitted cases).⁶² Though no public statistics report the number of applications filed by entrepreneurs as opposed to consumers, a Swedish reform commission in 2014 obtained

private reports from the court in Copenhagen and estimated that about 25 percent of Danish personal debt adjustment cases involved entrepreneurs.⁶³

Finland



Elsewhere in Scandinavia, law-makers have experimented with offering entrepreneurs discharge that interrupts their business activities less, at least in cases where the debtor will retain only *de minimis* business property. The Finnish personal debt relief law was among the first, adopted in 1993. It is unique in that it contains specific provisions on entrepreneur-debtors, including those who remain active in continuing businesses. Such debtors are admitted to the discharge regime if one of two conditions is met: either (1) the debtor has no (or only a few) personal debts emanating from the continuing business, and the property the debtor uses in that continuing business is “insignificant,” or (2) debts relating to the continuing business have not yet come due, and the debtor reasonably expects these debts to be covered by the income generated by the business. The debtor need not liquidate assets reasonably necessary for use in the business, once again as long as their value is commensurate with the income expected to be generated from business activities. A working group estimated in 2013 that around 300 small-businesspeople seek personal debt relief each year in Finland, and a reform process is underway to make the Finnish regime more effective for this group.⁶⁴

Sweden



Sweden was the last Scandinavian country to adopt a personal debt adjustment law, in 1994,⁶⁵ and for the same access-restriction reasons as for Denmark, entrepreneurs have struggled to gain entry to the procedure ever since.⁶⁶ Reviewing the Danish reform process, Swedish policymakers concluded that “serious” entrepreneurs should be allowed and encouraged to continue their businesses while undergoing a personal debt adjustment to strengthen their second chance and “benefit growth-promoting entrepreneurship.”⁶⁷ Since

system administrators had not responded positively to incremental reforms to the primary personal debt adjustment law, reformers decided to enact a new, separate law just for small entrepreneurs. Thus, the new “*F-Skuldsanering*”⁶⁸ procedure became available as of November 1, 2016, for individual debtors with primarily business-related debt. The procedure is in almost all respects exactly the same as an ordinary consumer debt adjustment, leading to an Enforcement Agency-confirmed payment plan, with a few key modifications.⁶⁹

Swedish entrepreneurs are required to demonstrate that they will be able to make minimum payments of around SEK6,500⁷⁰ (about US\$780 or EUR650) each calendar quarter⁷¹, that they are “serious” entrepreneurs, and that they have not conducted their business in an “irresponsible” way.⁷² In addition, as in Denmark, the payment term for administrator-approved entrepreneur discharge plans is three years, as opposed to the ordinary five in consumer cases. Examples of “irresponsible” business

conduct are offered in the legislative history, including poor bookkeeping and evasion of taxes and withholding obligations “to a greater than minimal degree.”⁷³ Time will tell how these restrictions are interpreted, but these are precisely the types of problems that tend to lead small entrepreneurs to bankruptcy court in other countries. Judging by past experience, the Swedish Enforcement Agency is likely to take a fairly rigid stance on admission of entrepreneur cases under the new law. After the Enforcement Agency was directed to launch a public information campaign on the availability and benefits of a liberalized personal debt adjustment process in 2013,⁷⁴ the number of annual applications increased by 10 percent each year from 2014 to 2016, but the percentage of approved cases has hovered around 60–65 percent for the past decade, at around 5,000 per year (spiking to over 7,500 in 2016).⁷⁵ One also wonders if the minimum payment threshold will deter some entrepreneurs from seeking or obtaining relief.



Creditor-Controlled, Simplified Restructuring as part of an MSME Insolvency Regime

For viable MSME businesses, a simplified, creditor-negotiated restructuring procedure should be available in an insolvency law alongside liquidation-and-discharge. For individual MSME debtors that wish to retain significant non-exempt assets, a simplified, largely out-of-court creditor-negotiated restructuring model seems to have enjoyed notable success around the world. In combination with a proper foundation of a freely accessible liquidation-and-discharge procedure, this alternative restructuring process aims to strike an optimal balance of interests. This alternative is ultimately available only if both the debtor and a majority of creditors agree that the venture has value worth preserving, and the debtor has the capacity to do so. Putting creditors in charge of evaluating the debtor's plan entrusts this decision to actors who are best situated to perform an accurate analysis and who will face the consequences of miscalculations. Requiring support only from a majority of voting creditors ensures that apathetic creditors, a common problem in MSME insolvency cases, cannot undermine an otherwise acceptable restructuring, and minority holdouts are prevented from interfering with a generally acceptable compromise.

Court involvement and other formalities in the MSME restructuring process can and should be limited. The principal process-related contributors to MSME restructuring failure stem from court procedures and other formalities that seem unjustified in the vast majority of MSME cases. The court-based approach of imposing restructuring plans on creditors, like in the U.S. and Republic of Korea, seems to be successful

but exceptional, relying heavily on the expertise of dedicated bankruptcy courts and a complex statutory structure. Most of the world seems resistant to the notion of allowing courts to impose compromise arrangements on creditors without significant creditor participation and voting on a plan, and enlisting the courts in a negotiated restructuring process for MSMEs risks injecting unnecessary complexity and cost into a process where experience suggests this is not necessary or helpful. The statutory requirements of court-based models also require courts to engage in speculative valuation of assets to ensure that the restructuring plan offers creditors no worse treatment than the liquidation alternative. Many countries in the world today lack the robust and insolvency-focused institutional structure to bear these burdens. Recent research on insolvency system efficiency concludes that in underdeveloped states in particular, court involvement invites formality, which has been a major contributing factor in failure to preserve enterprise value.⁷⁶ Leaving these decisions to creditors both avoids complexity and respects the historical prerogatives accorded to creditors of a failed enterprise.

Especially if court involvement is limited, the institutional infrastructure for a rescue regime is vitally important. MSME debtors clearly need special support in developing and implementing restructuring proposals, and some intermediary is likely needed to screen cases for both viability and obvious signs of fraud. These issues merit separate discussion and further examination. They are therefore presented separately in the penultimate section of this Report.

THE ELEMENTS OF A SIMPLIFIED RESTRUCTURING PROCEDURE

As in the liquidation-and-discharge context, the challenge here lies in identifying the key characteristics of a negotiated, out-of-court regime that maximize reasonable restructuring opportunities for MSMEs. The specific rules of this restructuring alternative may vary from state to state, but a few issues warrant special consideration. Based on a comparative review of existing regimes that allow individual debtors to retain non-exempt assets and continue their ongoing business operations, the following elements are proposed, as discussed in detail below:

- Open access, no maximum debt limits or minimum dividend requirements;
- Plan adoption by affirmative agreement of secured creditors (to the extent their claims are impacted) and majority vote of unsecured creditors;
- Exclusion or deemed consent of creditors not participating;
- Plan confirmed absent specific objection for carefully defined abuse.

Open Access, No Maximum Debt Limits or Minimum Dividend Requirements

Individual MSME debtors should have open access to the simplified restructuring process unless the case involves significant complexity. Most of the restructuring systems described in the empirical review below restrict access to debtors with total debts under prescribed limits, generally the equivalent of a few hundred thousand dollars in unsecured debt and perhaps a million or so in secured debt. Some court-driven systems also require a minimum dividend to unsecured creditors (an absolute amount or a percentage of the debt) as a formal or informal condition of plan approval. Presumably, both of these access limits were imposed for one of three reasons: (1) as a proxy for complexity and the need for more elaborate procedures to root out debtor fraud; (2) to substitute for the deprivation of creditors' right to vote in systems that subject plans

only to court approval; or relatedly, (3) to substitute for the incursion into creditor prerogative through a reduction of the required majorities, especially by way of negative approval processes (for example, not counting non-voting creditors).

In the great majority of individual MSME cases, none of these concerns seems to justify the imposition of either minimum dividends or debt limits. The Canadian debt limits on Division II Proposals have been criticized as too low to facilitate restructurings for small business.⁷⁷ The English IVA process has had success without either of these inhibitions, and where creditors have decided to demand “hurdle rate” minimum payments, they have exercised their prerogative to do so by voting against plans that do not promise such payment, for better or worse. Formal limitations on what creditors can or cannot accept by way of compromise restructuring arrangements seem unnecessary in light of creditors' power to gauge what they feel is acceptable in any given case. As for the shift in power to smaller and smaller groups of creditors to impose a “majority” decision on the minority, this is either a problem of creditor apathy, which is likely a rational decision on the part of creditors, or a logical progression in facilitating a still democratic process of group decision-making. Individual countries might experiment with larger or smaller majority thresholds, but restricting access by reference to debt limits and minimum dividends seems in most cases to be unnecessary, unjustified, and counterproductive.

Particularly complex cases might be converted to corporate reorganization proceedings upon substantiated demand by an insolvency administrator or creditor, though such cases are likely to be very limited. If the circumstances of an individual case exhibit such complexity that a minority of creditors believe a formal corporate process should be the only restructuring option, they might be allowed to move for conversion from the simple MSME procedure to the corporate restructuring procedure. The appropriate grounds for such a request are difficult to delineate in advance. They may include the availability of

recovery of preferential or fraudulent transfers to insiders or others, a challenge to the secured status of a large creditor, or a cause of action to be pursued against an insider or affiliate of the debtor. Mere volume of debt or asset value involved seems today to be an unjustified manner of marking the appropriate division between simple and complex restructuring methods for individual debtors. That being said, a request for conversion to corporate proceedings would require an assessment of the case's complexity from a fairly sensitive and sophisticated court or administrator. Relatively few states have the institutional capacity, judicial or administrative, to properly administer such a conversion-request system. Nonetheless, the incidence of such excessively complex MSME cases is likely minuscule and largely confined to high-income states.

Plan Adoption by Majority Vote of Unsecured Creditors

While secured creditors are generally given free reign to negotiate with debtors individually, unsecured creditors adopt restructuring plans by majority vote. The most common position with respect to secured creditors requires their affirmative consent to any plan that restructures their secured claims while the debtor retains the collateral securing those claims. As for unsecured creditors, in contrast, only a majority need support a restructuring plan for it to be imposed legally on dissenters. The more difficult question concerns the requisite majority: should it be 70 percent, two-thirds, a bare majority? The progression over the long sweep of history has been gradual, but there has been notable reduction in the volume of creditor support required to adopt a compromise plan. A simple majority (in both number of creditors and value of claims) of votes actually cast should serve as a sufficient safeguard of creditors' rights. Voting should be encouraged by allowing electronic or other convenient methods of communication, rather than requiring a formal, physical meeting of creditors where votes are cast.

Priority (preferred, preferential) creditors should be treated equally for voting and distribution

purposes with ordinary unsecured creditors. If significant MSME restructuring success is desired, priority unsecured claimants cannot be allowed to destroy compromises considered reasonable by a majority of creditors. Tax debts in particular raise crucial concerns for restructuring plans. If the consent of priority claimants such as tax authorities is required to confirm a plan, this veto power gives priority unsecured creditors the power to invalidate reasonable restructuring plans even if they are in the best interests of the parties involved. If public authorities expect private creditors to compromise their rights in support of reasonable restructuring proposals, then so too should public authorities be prepared to compromise their rights in connection with such plans, as long as (1) the requisite majority supports the plan; and (2) priority claims are treated no worse in the plan than ordinary unsecured creditors and receive at least as much as they would in a liquidation. Variations on this approach have been used (or can be designed), such as limiting priority by amount or time incurred (such as two years of taxes) or percentage (of overall debt, or of the claim itself), or in certain countries where compromise of the principal amount is illegal, comprise of the interest.

Exclusion or Deemed Consent of Unsecured Creditors Not Participating

The practice of calculating the majority based only on claims actually voted is widespread and should be standard. Creditor apathy has been a significant hindrance for MSME restructuring, and excluding absentees from the plan approval process seems eminently reasonable. Limited resources in MSME insolvencies lead to very limited expectations for unsecured creditors regarding any substantial distribution in respect of their claims. Thus, unsecured creditors often have little incentive to incur further costs (for example, attorneys' fees, travel costs, communication costs, investment of time) with regard to the insolvent debtor by participating actively in negotiations or proceedings. Overall, it is rational for a creditor not to participate, but creditors who make that rational choice should not be allowed to prevent

the establishment of a plan, so long as the plan offers objectively reasonable treatment to absent creditors (i.e., pro rata distribution with claims of similar priority, not unfairly discriminating against absent creditors or certain kinds of claims). Indeed, creditors who do not vote might be deemed to be just as satisfied with the debtor's proposed plan as without it, so the common practice of deeming creditors to consent to the debtor's proposal unless they explicitly object is also reasonable.

Plan Confirmed Absent Specific Objection For Carefully Defined Abuse

In instances of fraud or abuse, individual creditors or an insolvency administrator can and should be allowed to challenge a majority-approved plan. Even if a majority of creditors supports a plan, if individual creditors are treated unfairly, such concerns should be able to be aired and addressed, within reasonable limits. The concept of “abuse” or “unfairness” should be carefully defined and circumscribed, but if detractors can point to evidence of a system-undermining instance of misbehavior or abuse, they should have an avenue for pursuing such challenges. Intervention by the judiciary is appropriate in these cases to address concerns about due process, but the courts should be engaged only if and to the extent that judicial intervention is invoked. Creditors bring ordinary collections actions to the courts, and so should they be expected to bear the burdens of bringing to the courts any challenge to the negotiated (out-of-court) restructuring process. Here again, if creditors do not regard the expense of lodging such challenges to be warranted, they can and should reasonably be deemed to accept the natural result of failing to object. This is not an additional burden faced by creditors; rather, it is the natural continuation of the burden they would otherwise face in pursuing their claims if no restructuring process were initiated, and creditors can enjoy the benefits of this procedure without any expenditure.

EMPIRICAL REVIEW OF RESTRUCTURING REGIMES FOR INDIVIDUAL ENTREPRENEURS – CREDITOR-CONTROLLED

England, Canada, Australia (IVAs, Proposals, Agreements)



When English law makers liberalized the

bankruptcy and discharge regime in 1986, they also adopted a restructuring alternative for individual debtors. The Individual Voluntary Arrangement (IVA) procedure largely carried through the 19th century composition model, with small but important enhancements.

The court plays only a backup role, with the debtor's chosen “nominee,” a mandatory licensed Insolvency Professional (IP), playing the gatekeeping and facilitating role in what is essentially an unrestricted negotiation with creditors. The terms of an IVA are exceptionally flexible, with the outer boundaries marked only by what unsecured creditors are willing to accept (secured creditors must affirmatively agree to any modification of their rights), though a five-year payment term has emerged as the standard in practice, with certain creditors setting “hurdle rates” of minimum acceptable percent payment, sometimes as high as 45 percent.⁷⁸ The nominee must report to the court and creditors whether she/he believes the debtor's plan to be viable, and if (invariably) so, the nominee presents the plan to the creditors for their controlling vote: if the IVA is accepted by the creditors who hold 75 percent of the value of claims for which a vote is cast (non-voters' claims are excluded from the tally), the IVA becomes binding on all affected creditors (voting or not), and the nominee reports this success to the court and becomes a “supervisor,” guiding the debtor through the implementation of the compromise arrangement and distributing payments among the creditors.⁷⁹

The IVA was initially intended to be a bankruptcy alternative for small traders and guarantors of business debt, though consumer debtors have

come to dominate the IVA landscape since the early 2000s.⁸⁰ The IVA rules specifically envision the possibility of the debtor's continuation of a business.⁸¹ A study of creditor-accepted IVAs in 1994–95 reported primarily business use, with 81 percent (118/145), indicating a business-related reason for the filing.⁸² With IVA filings ranging from 5,000 to 8,000 per year before the consumer spike in 2004,⁸³ it is likely that at least 4,000 to 6,000 entrepreneurs currently enter an approved IVA each year.

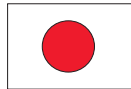
Because the negotiation stage of an IVA is largely private, no data track approved versus rejected IVA proposals, but the study of 1994–95 IVAs indicated a 67 percent rate of successful completion of accepted IVAs, with creditor distributions ranging from less than GBP10,000 to more than GBP100,000, and a heavy concentration between GBP20,000 and GBP50,000.⁸⁴ Official statistics indicate a global “termination” (failure) rate for approved IVAs of about 30 percent from 1990 to the consumer spike in 2004, which is consistent with the 1994–95 study's finding of 67 percent success.⁸⁵

The Canadian equivalent of an IVA is called a Proposal, either Division I (unrestricted) or Division II (restricted).⁸⁶ Division II proposals are restricted in that they may be presented only by individuals with unsecured debt less than CAN\$250,000. Division II Proposals are communicated to creditors without a meeting and are deemed accepted unless creditors holding at least 25 percent of claims demand a creditors' meeting, a quorum appears at that meeting, and a majority by dollar value rejects the proposal. Division I Proposals, in contrast, are not subject to a debt restriction and must be affirmatively accepted by a majority of voting creditors holding two-thirds of the value of all voted claims.⁸⁷ Only 972 and 965 business-related Proposals in both divisions⁸⁸, respectively, were registered in the years ending March 31, 2016 and March 31, 2017, in contrast to about 60,000 consumer Proposals.⁸⁹ The completion rate for business Proposals is about 70 percent.⁹⁰

Australia has a regime of bankruptcy-alternative arrangements similar to that in Canada. So-called Debt Agreements (Part IX) and Personal Insolvency Agreements (Part X) both allow an entrepreneur-debtor to continue to operate a business, and both are creditor controlled, much like IVAs, though they have slightly differing requirements. For example, Part IX agreements have income and debt limits (post-tax income less than AUS\$83,000, unsecured debt less than AUS\$111,000) and require *pro rata* payment to affected creditors, while Part X agreements have no such limits and allow for differential payments to similar unsecured creditors.⁹¹ The flexibility of Part X agreements leads inevitably to greater administrative costs, making this a more expensive solution for debtors.⁹² In 2015–16, only 175 Part X (unrestricted) agreements were registered, while statistics reflect 12,150 Part IX (restricted) agreements.⁹³ Judging by the ratios of business-to-personal insolvencies in the first quarter of 2017, about 25 percent of the 175 Part X (unrestricted) agreements were likely business related, while only 7 percent of the 12,150 Part IX (restricted) agreements involved business debtors, for a total, as in Canada, of about 900 individual entrepreneur cases in fiscal year 2015–16.

Aggregate data on Australian Part IX agreements (mostly non-business related) indicate a high rate of creditor acceptance (in excess of 80 percent on average), though given an average distribution to creditors of more than 60 percent on unsecured claims, there appears to be a significant degree of self-sorting of particularly strong cases into the agreements process.⁹⁴ The ultimate completion rate is difficult to establish, as raw numbers of completed and terminated agreements are reported annually without tying them to the original, varying start years. The number of successfully completed agreements continues to climb in recent years, however, approaching 7,000 in 2016, though more than 40,000 agreements remained underway in 2016, with a predominant agreed term of five years.⁹⁵

Japan (Civil Rehabilitation for Individuals with Small-Scale Debts)



The Japanese Civil Rehabilitation Act of 1999 (CRA) is discussed in greater length later, as it was adopted specifically to offer a streamlined procedure for rehabilitating small business entities.⁹⁶ As amended in 2001, however, it also provides an even further simplified (and less costly) procedure for individuals with “small-scale debts” (SSD).⁹⁷ This SSD procedure is similar to the Canadian Division II Proposal process,⁹⁸ with two significant differences. First, the debt limit in Japan is almost double that in Canada. The SSD procedure is available only to individuals with unsecured debts⁹⁹ of less than JPY50 million (about US\$450,000). Second, the three-year payment plan must promise a sliding scale of minimum dividend payments to creditors, at least 10 percent, often 20 percent, and as much as 100 percent in very small cases.¹⁰⁰ If these restrictions are met, the debtor’s proposed plan is circulated by the court to the debtor’s submitted list of creditors and is deemed accepted unless a majority by number of creditors and value of claims affirmatively votes to reject the plan. If a “rehabilitation officer” is appointed, his/her task is limited to investigating the debtor’s affairs, reviewing claims (if anyone objects), and assisting the debtor in drafting a plan.¹⁰¹

The SSD procedure is the dominant choice of business debtors seeking to restructure under the CRA. In 2005, for example, of a total of 19,401 business-related CRA cases, 18,567 were individual SSD cases (96 percent), with only 834 “ordinary” CRA small business cases (4 percent).¹⁰² Little empirical data on CRA proceedings are available, but a longitudinal study of higher-value CRA cases suggests that the SSD procedure accounts for most individual CRA business restructuring debtors. The study examined all of the 9,406 CRA cases with unsecured liabilities exceeding JPY10 million (US\$90,000) filed between April 2000 and March 2016, and it found that 7,341 of these involved business entities; therefore, no more than 2,065 total cases filed over a 16-year period involved individual entrepreneurs.¹⁰³ The study provides no information on the fate of the individual entrepreneur cases.

Chile (Renegotiation Procedures for Individual Debtors)



In 2014, Chile overhauled its bankruptcy process with Law no. 20.720 “on Insolvency and Re-entrepreneurship,”¹⁰⁴ introducing a four-quadrant structure of reorganization and liquidation for enterprises and individuals. One of these quadrants implements a process similar to a quite liberalized English IVA. The simplified reorganization procedure for natural persons provides a context, facilitated by the new Superintendent of Insolvency and Re-entrepreneurship,¹⁰⁵ in which individuals can renegotiate their debts and preserve their businesses. The process is rather formalistic, requiring several meetings of creditors before the Superintendent, but the law places no restrictions on workout plans, which are adopted by the affirmative vote of at least two creditors who hold a majority in value of approved (unsecured) claims.¹⁰⁶

The Superintendent has been successful in striking compromise arrangements among creditors and debtors in the first few years of the new procedure. From October 2014 through January 2017, just over 2,000 individual renegotiation cases were initiated before the Superintendent.¹⁰⁷ Of the 1,818 cases in which a plan confirmation meeting was held, creditors approved the debtor’s plan in 1,641 cases, an astounding success rate of just over 90 percent.¹⁰⁸ The most recent data available show an acceleration and continuation of this success, with 451 plan confirmation meetings from January 1 through June 30, 2017, and 418 approved plans, a success rate of nearly 93 percent.¹⁰⁹ No data report the nature of these debtors or whether they were in business.

EMPIRICAL REVIEW OF RESTRUCTURING REGIMES FOR ENTREPRENEURS – COURT-IMPOSED

United States (Chapter 13)



Chapter 13 of the U.S. Bankruptcy Code permits individual entrepreneurs (but not juridical entities) to seek relief from their debts while maintaining

business and non-business assets. Originally, Chapter XIII (as it was then designated, using Roman numerals) provided for a traditional composition process, with required approval by a majority of unsecured creditors.¹¹⁰ However, as amended in 1978, the present Chapter 13 requires no creditor vote; the court confirms the debtor's reorganization plan as long as it complies with a few, fairly objective statutory requirements.¹¹¹ Perhaps the most notable of these, consonant with European debt adjustment practice, is that the debtor must promise to turn over to creditors for a period of three to five years (almost invariably five years¹¹²) the value of all of the debtor's anticipated "disposable income."¹¹³ This concept is defined in a complex and often obtuse way in terms of the infamous "means test" implemented in 2005,¹¹⁴ and it must at least equal the amount that would be distributed in a liquidation of the debtor's unencumbered, non-exempt property.¹¹⁵

While Chapter 13 was not designed or perhaps even intended to facilitate the rescue of small businesses, it certainly can be and has been used in this way.¹¹⁶ Small business debtors are explicitly allowed to continue to conduct their business (unless the court orders otherwise), including taking on trade debt in the ordinary course.¹¹⁷ In calculating payments to creditors, the law specifically acknowledges the propriety of reducing disposable income "for the payment of expenditures necessary for the *continuation*, preservation, and operation of such business."¹¹⁸

The most significant limitation on entrepreneurs' use of Chapter 13 is a pair of strict debt limits. An individual may be a debtor under Chapter 13 only if he or she has non-contingent, liquidated unsecured debt less than US\$394,725 and secured debt less than US\$1,184,200.¹¹⁹ And simply getting in is no guarantee of successful plan confirmation or obtaining a discharge. Chapter 13 cases proceed very expeditiously. The debtor must file a plan with the petition or shortly thereafter, begin making payments on that plan to the trustee within 30 days of filing,¹²⁰ and within 50 days of filing, the system regulator (the U.S. Trustee) convenes a meeting where the case trustee and creditors

can interrogate the debtor.¹²¹ Between 20 and 45 days later, the court is directed by statute to hold a confirmation hearing.¹²² Failure to abide by and be prepared for these deadlines often leads to case dismissal (or conversion to a Chapter 7 liquidation bankruptcy).¹²³ System-wide, 70–80 percent of submitted plans are confirmed, but only about one-third are completed.¹²⁴

The proportion of successful Chapter 13 cases that involve entrepreneurs cannot be established accurately. The scant empirical evidence on Chapter 13 tends to focus on general usage patterns, with little focus on entrepreneurs and distinguishing them from consumers.¹²⁵ Academic and official estimates vary. Official statistical reports are likely highly inaccurate in distinguishing business from non-business filings.¹²⁶ They suggest that less than 1 percent of Chapter 13 filings are "business" cases, though this represents nearly 30 percent of all reorganization cases filed under Chapters 11 and 13.¹²⁷ Prominent academic empirical studies, in contrast, conclude that a significant portion — at least 15 percent — of Chapter 13 filings (and a roughly equal portion of Chapter 7 liquidation filings) involve entrepreneurs,¹²⁸ which is consistent with the 20–25 percent seen in European personal debt adjustment systems. The specific characteristics and experiences of entrepreneurs in Chapter 13 remain largely a mystery.

Republic of Korea (Individual Rehabilitation Proceeding)



Since a system-wide insolvency reform process began in 2004, Republic of Korea has had a procedure modeled on and similar to the U.S. Chapter 13 process. The Republic of Korean Individual Rehabilitation Proceeding (IRP) was designed to facilitate the rescue of wage-and-salary earners as well as debtor-entrepreneurs. In particular, the IRP allows debtor-entrepreneurs to continue operating their micro and small enterprises to earn business income and use it to support a court-confirmed repayment plan.¹²⁹ The process, timing, and product of the Korean IRP generally tracks the U.S. Chapter 13 process, with a similar

debt limitation (KRW500 million in unsecured debt, about US\$450,000, and KRW1 billion in secured debt, about US\$900,000), but with one significant difference: An IRP does not affect secured claims (other than staying their enforcement during the period between case commencement and the court's approval of the plan).¹³⁰ In the context of small business insolvencies, this may be a minor difference, since U.S. Chapter 13 does not affect debts secured by an individual entrepreneur's principal residence (or debts that require longer than five years to pay off), and empirical research suggests that lending to small businesses in amounts less than US\$100,000 is increasingly unsecured (perhaps on personal or business credit cards), but personally guaranteed by the entrepreneur.¹³¹ However, it is notable that in the Korean IRP, the entire amount of the "disposable income" must be used for payment of unsecured debt under the repayment plan and may not be used for repayment of secured debt (including debt secured by a residential mortgage). Therefore, in the Korean IRP, secured claims are usually collected by foreclosure. But, in some cases where debtors so request and it is deemed reasonable, the Seoul Bankruptcy Court allows debtors to calculate the "disposable income" except the interests of secured claims encumbered by frugal home (regarding the interests as a living cost), so that debtors eventually can keep paying the residential secured claim's interests without fearing the foreclosure of their home during the IRP plan period.

The plan confirmation and discharge rates for the Korean IRP also mirror those for U.S.

Chapter 13. In the 21 months from July 1, 2015, to March 31, 2017, a total of just under 15,000 individual entrepreneurs with reported business income applied for the IRP (along with just over 144,000 applicants with reported non-business, salary income), or about 9 percent of the total IRP applicants.¹³² The plan confirmation rate for individual debtors with business income amounted to 86 percent, though this was after the courts applied a fairly rigorous screening process that led to court rejection of nearly 15 percent of all applications for IRP.¹³³ But most of the rejected applications involve debtors who improperly provided documents. The rate of ultimate plan completion and discharge is not reported separately for business and non-business debtors, but the general completion-and-discharge rate is reported to have been an impressive 42.7 percent.

Both the legislature and the courts in Republic of Korea have responded over time with measures to make the IRP process more effective for individual debtors. To reduce pressure on debtors and increase their incentive to complete plan payments, the term of an IRP plan was reduced from an original 8 years to 5 years in 2006, and then again to 3 years in 2018. In addition, although the courts had applied a fairly rigorous case screening process in the past, the Seoul Bankruptcy Court has changed this practice in the hope of better achieving the mission of rescuing financially ailing individual debtors by enlisting individual rehabilitation commissioners to advise debtors to draft feasible IRP plans while considering various living expenditures.



Juridical Persons and Natural Persons Should Access the Same Restructuring Procedure

BALANCING REORGANIZATION AND LIQUIDATION FOR JURIDICAL ENTITY MSMEs

MSME insolvency policy shifts considerably when proceeding beyond natural person entrepreneur debtors to artificial juridical person debtors. Just as the liberal discharge for individual debtors was beginning to develop in the late 1800s, another major legal innovation arose, also with the goal of encouraging risk-taking, entrepreneurial activity. This effect was achieved by allowing individuals to do business via artificial entities and offering relief not *after* failure, but in *advance*. In the mid- to late-1800s, states began to liberalize the availability of private corporations (and other limited liability entities) to shield individual business people from future business liabilities. Now, not only major, multinational corporations like the East Indies companies, but also ordinary MSMEs could limit their liability risk in advance by concentrating and limiting risk exposure on a pool of invested assets.

Artificial entities have already conferred a discharge-in-advance on their individual owners through the institution of limited liability. The compromise for this is to give creditors access to the invested and accumulated assets of the artificial entity to back the credit and other claims against that entity. Bankruptcy liquidation regimes play an important, ongoing role in coordinating creditors' claims against insolvent business entities and finalizing the recovery or loss on those claims from the debtor-entity's limited assets. Even very recent commentary therefore continues to identify the primary goals of (artificial entity) business insolvency proceedings as benefitting the affected

debtor's creditors by (1) maximizing the value of the debtor-entity's assets, and (2) ensuring equitable distribution of that value among the entity's creditors in accordance with ordinary rules of priority.¹³⁴ The law of limited liability offered this value to creditors, and it remains generally within their control how to maximize that value, through liquidation and winding-up or otherwise.

Laws facilitating “compositions” among debtors and creditors represent the genesis of a rescue and reorganization movement that would gradually evolve over the next 150 years toward reducing the majorities of creditors whose support was required to impose a composition on all creditors. Given the varying incentives of different creditors, concern arose that holdouts might demand a dismemberment and piecemeal sale, derailing an otherwise viable value-preserving restructuring. To address this potential inter-creditor conflict, a variety of mechanisms have emerged to empower a large majority of cooperative creditors to speak for and bind a disagreeable and destructive minority.

Whether and on what terms to facilitate a company rescue by intervening in the debtor-creditor negotiation of a restructuring of juridical entity MSMEs is a key academic and policy sticking point. Insolvency best practices have long accepted the propriety of reducing the power of holdout minorities to undermine a potentially value-preserving workout. Favoring restructuring of MSME companies is supported by societal concerns for the preservation of going concern value, especially to employees and communities dependent upon the artificial entity's activities. But the compelling force of the benefit

of MSME restructuring is often ambiguous given the limited size of most such entities, and it is not at all clear that process concerns rather than basic business weakness leads to the unsatisfying level of successful entity reorganization, especially for MSME companies with limited assets and liabilities (that is, less than several *million* local currency units).

While concerns about employment and community reliance support larger corporate reorganization efforts, there is little evidence that smaller MSME juridical entities have sufficient community impact and going-concern value to warrant a restructuring procedure. What little empirical support that does exist relies on projections and estimates of liquidation value, which directly implicate the very concern that the Law & Economics world has with non-market based valuation methods.¹³⁵ Indeed, it is not at all clear that procedural complexity and cost are the cause of most MSMEs reorganization failures, as opposed to non-process related factors, such as fundamental problems with these businesses, the economy, the market for finance,¹³⁶ or the lack of support offered to MSME directors.¹³⁷ Even the most ardent supporters of business rescue have identified a variety of common, business-related reasons why, in more than half of Chapter 11 cases for example, the debtor never even files a plan, much less submits it to creditor vote.¹³⁸

Moreover, there are real opportunity costs to favoring reorganization for all MSMEs and locking entrepreneurs into failed businesses, rather than giving them a *personal* fresh start and encouraging them to move on to the next venture.¹³⁹ There continues to be a marked philosophical difference of opinion on whether to give all comers a chance, relying on sensitive institutions to sort out the “dead on arrival” cases from those with restructuring potential,¹⁴⁰ or instead to avoid the massive inefficiency and potential perceived unfairness (“debtor-friendliness”) of this approach and rather focus on redeploying the discharged and rescued human entrepreneurial capital quickly. These observations illustrate the truth of the statement in the ICR Principles that

many “policy choices [are] involved in developing ... solutions” to insolvency resolution systems.¹⁴¹

OPTIMIZING JURIDICAL ENTITY MSME RESTRUCTURING PROCEDURE

If more MSME juridical entity restructuring is desired, an optimal procedural approach must be quick, simple, and relatively inexpensive. In an effort to remove procedural barriers and support more juridical entity restructuring, particularly for medium-sized companies, some lawmakers have removed obstacles in the corporate restructuring rules that increase expense and complexity; e.g., creditor control, especially creditors’ committees, and other monitoring and oversight institutions (disclosure statements, court hearings). They also have imposed stricter deadlines and reporting requirements, however, in part in an effort to divert the likely failures of MSME company restructuring to a quick liquidation. As discussed below, the regimes in Japan and Republic of Korea have identified corporate reorganization complexities to be avoided (e.g., organized committees of creditors) and lowered creditor voting thresholds in a way that brings MSME entity cases closer to individual entrepreneur cases. These are not so much special proceedings so much as slightly more structured or demanding versions of simple arrangement proceedings for individual entrepreneurs.

The complexity and cost of company restructuring procedures seem to be largely if not entirely a function of the complexity of these debtor-entities and the problems these procedures are designed to work out. From this perspective, the question should be — and the Japanese and Korean regimes seem to be asking — whether MSME juridical entity insolvency cases are more likely to present the kinds of complexities present in corporate reorganization cases as opposed to the relative simplicity of an individual natural person restructuring case.

Smaller MSME juridical entities tend to be more like individuals than like complex corporate enterprises in relevant respects, in that they seldom have multiple tranches of tiered debt,

complex multi-division business operations, and numerous contractual arrangements that warrant review and restructuring. Rather, a relatively concentrated group of creditors already has an adequate grasp of the debtor's relatively straightforward situation and can assess the feasibility of a simple restructuring in relatively short order. If a complex, court-directed process is warranted by the complexities of the case, the corporate reorganization process might be engaged. Otherwise, no more procedural complexity or higher voting margins than that imposed on individual entrepreneurs seem justified for small companies, and the flexibility of the out-of-court individual process would foster a much greater degree of MSME restructuring success while still leaving creditors in ultimate control.

The optimal compromise position thus seems to be treating most MSME juridical entities like individual entrepreneurs with whom they share the key characteristics of low value, low sophistication, and low complexity. Given the similarity of the issues facing individual entrepreneurs and most small-scale business entities, it seems most sensible to apply by default the same simplified creditor-negotiation model discussed above to all MSME restructuring cases, for both natural individual and juridical business-entity debtors. The restructuring option for MSME juridical entities should by default mirror that offered to individuals: a simplified creditor-negotiation model, administered out of court through simple majority voting, in all cases where a more complex corporate restructuring regime is not chosen by the debtor-entity or shown by an insolvency system administrator or creditors to be necessary.

The straightforward approach of applying the individual simplified restructuring regime to most small companies can solve the main problems of complexity and cost much more directly and effectively than developing bespoke processes or even modifying the formalities of in-court procedures. Objections to imposing yet another compromise on creditors who have already compromised their claims by dealing with a limited liability entity are somewhat mollified by the fact

that this remains a creditor-controlled process. And if the entity is “dead on arrival,” the insolvency professional or administrator can establish that quickly, express that to creditors, and guide the case to a quick closure if that is the right option, all while minimizing cost to both debtors and the formal insolvency system.

ELIGIBILITY LIMITS AND REQUESTING TRANSITIONS FROM MSME PROCEDURES TO CORPORATE REORGANIZATION

The key challenge here is drawing the line between artificial entities that should be offered access to the simplified process available to individuals, with less expensive simplified restructuring procedures, and those that are more appropriately relegated to the corporate restructuring process, with its largely unavoidable complexity and cost. Experience in both the U.S. and Japan suggests larger entities will seek to use simplified procedures in a way that creditors might find objectionable. Any such dividing line should be drawn not based on labor department employment measures or other non-bankruptcy-specific metrics, but guided by the specific problem to be addressed: complexity. This Report takes no particular position on the precise definition or characteristics of “complexity,” but the optimal approach to juridical entity MSME restructuring does seem to be most appropriately a matter of choosing such a factor by which to direct cases either to the procedure applicable to natural person MSMEs or the complex corporate reorganization regime, rather than creating yet another procedure specifically for MSME entities.

There are several approaches to distinguishing generally between MSMEs and larger business entities (such as numbers of employees or creditors, etc.), but in the specific context of MSME insolvency proceedings, using liability volume as an efficient proxy for complexity is particularly common and has been empirically justified. The American Bankruptcy Institute Chapter 11 Commission chose US\$10 million in total assets or liabilities as the ceiling/dividing line,¹⁴² the NBRC chose US\$5 million in total

debt,¹⁴³ while a prominent empirical study¹⁴⁴ and U.S. and Korean legislators favored US\$2 million (now US\$2.5 million). European authorities and U.S. practitioners mark the boundary between “small” and “medium” enterprises at US\$10 million in assets or debts.¹⁴⁵ The suggestion in the preceding cases seems to be that a medium enterprise with US\$10 million, US\$5 million, or even perhaps as little as US\$2.5 million of assets or debts most likely has the resources and needs a mechanism to sort out a complex matrix of claims and constituencies.

Liability volume is not the best proxy for complexity, however, and it is difficult to find the right dividing line in various jurisdictions with very different monetary values and economic conditions of small business. It seems more efficient and productive to change the starting point of this analysis to a presumption that reflects the reality of MSMEs and the problems they face. A better approach would presume applicability not of complex corporate proceedings and seek debt-volume-based exceptions, but rather presume that the proper approach to small entities (defined flexibly by policy-makers in accordance with various domestic contexts and perspectives on complexity) is to allow them access to the same one taken to individual entrepreneurs and allow challengers to rebut this presumption and move for conversion to corporate reorganization procedures.

If a debtor-entity chooses simplified proceedings, and creditors or system administrators believe more complex, corporate reorganization proceedings are more appropriate, such challengers should bear the burden of justifying this conversion. Perhaps closer scrutiny of fraudulent behavior is necessary, or significant transfers of value can be recovered for the benefit of the estate, or some other mechanism available only in complex reorganization proceedings is highly valuable for the case. MSME entity cases would be relegated to corporate restructuring, though, only when and if the entity’s restructuring case exceptionally implicates such complexity as to warrant those more elaborate and therefore more expensive procedures. Entities with sufficiently

large asset or liability levels might be presumed sufficiently complex, but most large entities will likely choose corporate reorganization procedures voluntarily, so conversion requests should be relatively rare and confined to the largest medium-sized enterprises. If either the debtor-entity or creditors accurately perceive the need for complex proceedings to sort out an MSME entity’s affairs, greater expense appears to be inevitable.

In disputed cases, which are likely to be a small minority, conversion motions by creditors may lead to significant litigation burdens, but this is likely an inevitable and controlled cost of a maximally efficient and effective solution. The early 20th-century U.S. system was deluged with such litigation involving large corporate debtors who filed simplified Chapter XI cases, not wanting to undergo complex Chapter X reorganization proceedings, but opposed by creditors and administrators who preferred the enhanced scrutiny. This litigation and other challenges to allowing companies access to the individual out-of-court restructuring process is likely a necessary evil. The farther down the road one travels away from careful monitoring and oversight, the more issues of perceived unfairness are implicated, a problem vividly illustrated by the recent debate about streamlined out-of-court administration in England and pre-packaged “phoenix” reorganizations of MSME companies via sale back to the entrepreneurs (often in leveraged buy-outs financed with deferred payments).¹⁴⁶ The cost of court oversight of conversion requests in a few larger cases should be an acceptable price for smoothing the restructuring path of the great bulk of unopposed MSME entity arrangement negotiation cases.

This approach achieves the necessary balance of flexibility and simplicity to support maximal MSME restructuring while maintaining insolvency system integrity and respecting creditors’ abilities to control the outcome and oppose simplified procedures in more complex, higher-value cases. This solution is also properly oriented on the factual criteria — value and complexity — that are the animating concerns of corporate restructuring procedures.

EMPIRICAL REVIEW OF RESTRUCTURING REGIMES FOR MSME JURIDICAL ENTITIES

Technically, lawmakers have taken one of two approaches to MSME juridical entity restructuring procedures: modifying an existing corporate restructuring regime, or constructing a separate procedure specifically directed at corporate entity MSMEs. Given the variety of other distinctions among these regimes, it is not clear that the technical approach matters as much as the substance of the operative provisions—which often resemble simplified procedures applicable to individual debtors—and even more important, the support (or lack thereof) from institutional actors.

Comparing the filing figures in existing regimes, it seems that MSMEs prefer insolvency systems intended for natural persons over modifications of the corporate insolvency process. Most systems designed specifically for small business and MSME corporate entities are undersubscribed. Instead, juridical entity MSMEs use the individual procedures overwhelmingly more often, seemingly to good effect.

United States (“Small Business” Chapter 11)



In 1994, several streamlined modifications of Chapter 11 were made available to MSMEs that elected to be treated as “small businesses,” but few companies accepted this invitation. Thus, when reformers returned to this issue, the dual questions were whether to force small business entities into this special treatment and what the goals of the special regime should be. The National Bankruptcy Review Commission proposed that the small business provisions become mandatory, and they were quite candid in their explanation of the reason: for most MSMEs, “the primary goal [was] to reduce the amount of time they consume in Chapter 11” by “identifying [weak] cases early and removing them from Chapter 11.”¹⁴⁷ For the “relatively small proportion of cases in which the debtor has a reasonable likelihood of confirming a plan and succeeding as a going business,” the goal was “reducing the high cost of, and time delays

in, Chapter 11.”¹⁴⁸ For this latter, small group, the Commission proposed a simplified disclosure and plan confirmation process.

The long-discussed notions of (1) developing a new, streamlined “Chapter 10” specifically for MSME restructuring; or (2) giving small enterprises access to the vastly simplified Chapter 13 individual reorganization regime were rejected out of hand by the Commission, without substantive explanation.¹⁴⁹ The Commission’s modifications to the procedure for small businesses appeared to be directed more at pushing MSME cases out of Chapter 11 than facilitating reorganization. They included shorter plan filing and confirmation deadlines, additional operational reporting requirements, and probing oversight by the U.S. Trustee.¹⁵⁰

A simplified and expedited plan¹⁵¹ process was adopted for MSME debtors in 2005 in the U.S. with some requirements waived and timelines shortened. The usually required “disclosure statement” and the hearing preceding the call for the plan vote may be simplified or dispensed with in small business cases, and only the debtor may file a plan within the first 180 days of a small business case.¹⁵² But a plan must be filed within the first 300 days of the case, and a filed plan must be confirmed within 45 days after filing (that is, a maximum of 345 days after case commencement).¹⁵³ These deadlines can be extended, but only upon the debtor’s showing that “it is more likely than not that the court will confirm a plan within a reasonable period of [extended] time.”¹⁵⁴ In “ordinary” Chapter 11 proceedings, in contrast, the debtor’s exclusive period for filing a plan is only 120 days, but it can be and usually is extended up to 18 months upon a lenient showing of cause,¹⁵⁵ and there is no deadline for plan confirmation.

These restrictive provisions apply only to “small business cases,”¹⁵⁶ defined as Chapter 11 cases filed by “small business debtors.” A “small business debtor” is any person engaged in business with liquidated total debt (secured and unsecured) of US\$2 million or less,¹⁵⁷ whose case does not have an active official committee of unsecured creditors.¹⁵⁸

Since it is quite common for an insufficient number of creditors to be willing to serve on an official Chapter 11 committee,¹⁵⁹ the US\$2 million debt limit is effectively the sole determinant of “small business” status.

Small business debtors are scrutinized more closely in the specialized procedure than in a standard Chapter 11 case, with a bias toward early case dismissal or conversion to Chapter 7 liquidation. Small business debtors must file pre- and post-petition financial statements and tax returns (or a sworn statement that one or more of these documents does not exist) as well as detailed reports on operations, profit projections, and compliance during the pendency of the case.¹⁶⁰ They also must attend early intervention (viability) meetings with the bankruptcy system supervisor (the U.S. Trustee), and allow the U.S. Trustee to investigate the debtor’s business operations at any time.¹⁶¹ The U.S. Trustee is directed to monitor small business cases carefully to be prepared to move for dismissal or conversion if it appears unlikely that the debtor can confirm a plan.¹⁶²

U.S. small businesses appear to be evading the small business Chapter 11 regime, rather than embracing their cost- and delay-reducing application. In a recent nationwide study of individual Chapter 11 debtors, while more than half of the sample included debtors engaged in business with total debt below \$2 million and no creditors’ committee, only about 13 percent self-identified as “small business debtors,” even though the rules¹⁶³ and forms require this self-designation.¹⁶⁴ Another small study revealed that, of just under 2,300 Chapter 11 cases filed in 2007 with primarily business debt less than \$1 million, only 36.8 percent identified as “small business debtors.”¹⁶⁵ One commentator explained this phenomenon in candid terms: “In reality, the small business Chapter 11 provision is ... a bad thing for small businesses. Chapter 11 practitioners ... have given the small business Chapter 11 provisions ... a pretty universal thumbs down.”¹⁶⁶ Official statistics seem to confirm this negative perception of small business Chapter 11 by potential filers: Between

2006 and 2008, the percentage of Chapter 11 cases identified as “small business cases” shrank from one-third to one-quarter.¹⁶⁷

Argentina, India, Greece, OHADA



Other regimes mentioned in the first *Report on the Treatment of MSME Insolvency*¹⁶⁸ (and described in greater detail elsewhere¹⁶⁹) have instituted modifications of the ordinary reorganization regime (India, the Organization for the Harmonization of Corporate Law in Africa (OHADA)), and they are possibly so minor as to have no likely positive effect (Argentina, Greece) or are so new that no empirical evidence of their operation is available (India, OHADA). The many Greek reforms reportedly have failed to achieve their intended effects, and the 2014 reforms to the voluntary restructuring framework for small businesses expired in March 2016.¹⁷⁰

England (Company Voluntary Arrangements)

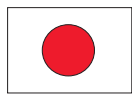


The rescue-oriented Cork reforms of 1986 pursued parallel tracks for individuals and entities. While individuals were empowered to negotiate IVAs with their creditors, entities were similarly empowered to negotiate Company Voluntary Arrangements (CVAs) with theirs. The two processes operate in nearly identical fashion, and neither is limited to small businesses,¹⁷¹ though larger business entities generally pursue negotiated restructurings in the context of a scheme of arrangement under the Companies Act.¹⁷²

Unlike the relative success of the IVA procedure, however, English insolvency professionals report that the CVA process is generally ill-suited to rescuing smaller enterprises, given the costs of the process, and CVAs often result in liquidation of the entity.¹⁷³ A report on CVA outcomes found an eventual failure rate of over 70 percent in a sample consisting of 90 percent small companies (74 percent of which were micro enterprises, with issued share capital less than GBP100).¹⁷⁴ The most common outcome (61 percent) was a breakup sale of the entity.¹⁷⁵

Even among business cases, the CVA is a little-used procedure in comparison to the IVA. In contrast to about 5,000 business-related IVAs per year,¹⁷⁶ the number of CVAs has steadily declined from a high of about 800 in 2011–12 to fewer than 400 in 2016,¹⁷⁷ and most of these were likely on their way to a breakup liquidation. Already in the mid-1990s, one commentator characterized the CVA as “a dead letter.”¹⁷⁸

Japan (Civil Rehabilitation)



When Japan began revising its insolvency law in 1999, it retained a CVA-like structure as part of an insolvency system that by design strongly resembles the pre-1978 US bankruptcy law. In the US, before there was Chapter 11, there was Chapter XI. The US Bankruptcy Act of 1898, as reformed in 1938, divided court-based business reorganization into two segments, Chapter X for large corporations with diffuse shareholdings, and Chapter XI for closely held companies.¹⁷⁹ Chapter X was designed for the protection of public investors, not to smooth the reorganization process. A trustee ousted management in all cases, and the Securities and Exchange Commission scrutinized all Chapter X reorganization plans. Lauding its operation, contemporaries noted “[i]ts ritual is more complex and impressive, its substance more satisfying, its promise of protection to investors more emphatic.”¹⁸⁰ Chapter XI, in contrast, “provide[d] for a cheap and practical method of settlement, based on the history of composition in bankruptcy.”¹⁸¹ Chapter XI left the debtor’s management in place to engage a simple procedure for negotiating a compromise among majority voting groups of creditors. As a result, large corporations often sought to use Chapter XI, leading to protracted litigation about the ambiguous boundaries between the “large” and “small” business reorganization provisions.¹⁸² The 1978 US Bankruptcy Code mooted these disputes by jettisoning the bulky Chapter X and folding much of its complexity into the small business Chapter XI, leaving a single business reorganization vehicle in a new Chapter 11, but with no distinct small business restructuring regime.¹⁸³

Unlike the U.S., Japan retained its separate small business restructuring mechanism when it revised its insolvency law. Japan’s 1952 Corporate Reorganization Law (*Kaisyō Kosei Hō*) was modelled on Chapter X.¹⁸⁴ The analogue to Chapter XI is the regime examined here, the Civil Rehabilitation Act (CRA) (*Minji Saisei Hō*), adopted in 1999 not as a major innovation, but simply to “improve and simplify” an earlier Composition Law, which was based on the 1914 Austrian model and operated very much like an in-court version of the later English CVA process.¹⁸⁵ Big businesses resist using the restrictive Corporate Reorganization Law, preferring the less intrusive and more nimble process under the CRA.¹⁸⁶ A broad-based study of CRA company cases filed from 2000 to 2016 notes that usage by large companies is conspicuous, including, for example, Lehman Brothers Securities Co., Ltd.¹⁸⁷

The CRA remains the preferred restructuring option in Japan, especially for MSMEs, though filing statistics indicate that “small-scale debt” (SSD) proceedings under the CRA greatly outnumber ordinary CRA filings, indicating a clear preference for the procedure more geared toward individuals. As stated previously, in 2005, of a total of 19,401 business-related CRA cases, 18,567 were individual SSD cases (96 percent), with only 834 ordinary CRA small business cases (4 percent).¹⁸⁸ One likely reason for this is cost. Each court sets its own fee structure, and while the simplified SSD procedure requires an average filing fee of only about JPY40,000–JPY80,000 (US\$360–US\$720),¹⁸⁹ the fee for ordinary CRA procedures ranges from JPY2 million–JPY8 million, with a median of JPY6 million (US\$54,000).¹⁹⁰ Another potential explanation is the CRA screening mechanism that requires the court to dismiss a case when it is clear that there is no possibility that a plan will be approved, or when the petition was not filed in good faith.¹⁹¹ These rejections seem to be rare, however.¹⁹²

About 80 percent of CRA cases concern business entities even though individuals are also allowed to file. Individuals understandably opt for the alternative SSD proceeding. The debtor-

company's management remains in possession, and an automatic stay prevents all but secured creditors from taking action against the debtor's property.¹⁹³ In contrast to the simplified SSD process, in the ordinary CRA procedure creditors are required to file proof of their claim, and the debtor must prepare and submit to court an inventory of all assets and their value.¹⁹⁴ The debtor has no exclusive period for submitting a plan, though creditors seldom submit competing plans, and rather than regulating the content of plans (other than a maximum length of 10 years¹⁹⁵), the law submits the plan for creditor approval. Plans are adopted by the affirmative vote of a majority of all scheduled creditors, who must hold at least 50 percent of scheduled claims. The court confirms the approved plan if it believes the plan to be feasible, and the debtor is immediately discharged from claims not scheduled for satisfaction in the plan. The court may, and usually does, appoint a court official as supervisor of the debtor's execution of the plan for the first three years of its operation.¹⁹⁶

Confirmation rates for plans are high, so the system allows some rehabilitation, though many of the rehabilitated companies do fail at a later date. The entire process takes on average only five to seven months, and plan confirmation rates are high (about 80 percent).¹⁹⁷ A longitudinal study of post-CRA outcomes for all 7,341 company CRA cases with debt totaling at least JPY10 million (US\$90,000) reveals that, as with English CVAs, more than 70 percent of these Japanese CRA cases were followed by the companies' ultimately ceasing to do business, mostly (60 percent) by full termination, though others by merger or transfer to a sponsor.¹⁹⁸

Republic of Korea (Summary Rehabilitation Proceedings)



Korea's first bankruptcy and reorganization laws were adopted in the early 1960s and were modelled on Japanese law. The Republic of Korea reformed its insolvency laws in the early 2000s, later consolidated into a unitary Debtor Rehabilitation

and Bankruptcy Act in 2006.¹⁹⁹ As discussed earlier,²⁰⁰ the Korean Individual Rehabilitation Proceeding (IRP) has been available since 2004.

A new, cognate rehabilitation procedure, available to small business debtors (both natural persons with larger debts as well as juridical persons), was adopted more recently, effective July 1, 2015, to reduce the cost and complexity of the ordinary rehabilitation proceeding.²⁰¹

The scope of application of this new Summary Rehabilitation Proceeding (SRP) mirrors the "small business" designation in U.S. Chapter 11, and ordinary corporate reorganization rules apply unless supplanted by specific SRP provisions. The two major differences between the IRP and SRP are that, in addition to being available to business entities, the SRP has a higher debt limit and submits plans to creditor approval. The SRP is available to debtors (including individuals and companies), who are expected to earn business income, and whose total secured and unsecured debt does not exceed 3 billion won (US\$2.7 million—almost identical to the current "small business" limit under U.S. Chapter 11). No trustee or creditors' committee is appointed, but an examiner is appointed to opine on the continued viability of the business, albeit in simplified form (and at the reduced cost of US\$3,000–US\$5,000 for companies, vastly less than the US\$15,000–US\$120,000 in examination fees in ordinary reorganization cases, and generally cost-free examination by a court official for individual debtors). Korean SRP plans may not exceed 10 years, and since a reform in 2015, they are approved by the affirmative vote of (i) at least three-fourths (by amount) of secured creditors and (ii) at least two-thirds (by amount) of unsecured creditors (or more than one-half by amount and more than one-half by number of unsecured creditors). Ordinary cram-down rules apply. Plans must be submitted within about five to eight months of case commencement (usually only about 70–100 days in practice, as determined by court scheduling order) and must be approved by creditors and confirmed by the court within a year after commencement (usually 100–200 days in practice) unless extended for cause up to 18 months.²⁰² In practice, SRP plans

are approved by the creditors and confirmed by the court within about 100 days pursuant to the court's standard scheduling. Upon the court's confirmation of the plan which is immediately granted after the approval of the plan by the creditors, the pre-commencement claims (other than specified category of debt) which are not recognized in the plan shall be irrevocably discharged. The time of discharge under the SRP is more favorable to the debtors than discharge under the IRP which is usually granted after completion of payment under the plan

As in Japan, the overwhelming majority of MSME cases appear to be under the IRP, the procedure for individuals. Official statistics from the first 21 months of operation of the SRP (July 1, 2015, to March 31, 2017) reflect that the ratio of business-related IRP-to-SRP cases is similar to that in Japan, with 94 percent of potential MSME activity in the individual IRP process (14,973 cases) and 6 percent in the SRP process (903 cases).²⁰³ More surprising, the SRP cases are divided almost evenly between individual and corporate cases, with 472 entity cases and 431 individual cases.

The Korean SRP has produced an impressive degree of success in plan confirmation,

consistent with a similar degree of success in ordinary rehabilitation proceedings. It should be noted that it is unclear how confirmed SRP plans will ultimately perform, as the earliest ones have been in place for only a short time. Significant numbers of SRP applications are withdrawn (about 20 percent), but the courts also reject a further 6-8 percent. Of those that remain, about half succeed in confirming a plan.²⁰⁴ It is noteworthy that the rate of commencement and plan confirmation in the ordinary corporate rehabilitation proceedings is almost identical to the SRP process, with a 10 percent rate of court rejection of applications and a 52 percent rate of plan confirmation for companies (48 percent for individuals).²⁰⁵ Perhaps the success rate for MSMEs would be far smaller if they were subjected to the costly and complex ordinary regime, but the parallel in success rates among the ordinary and summary procedures (for companies and individuals) is striking. One reason for this impressive rate of success seems to lie in the special attention the Korean courts have paid to MSME cases, collaborating with the Small & Medium Business Corporation to support these companies in consulting on and preparing rehabilitation petitions, and lending an air of persuasive credibility for potentially dissenting creditors.





Institutional Structure: Specialized Professionals and/or Institutions with Oversight, Training, and Procedures Specific to MSMEs Should Administer the Process

Institutions and professionals are critical to the success of any proposed MSME insolvency regime. This Report fully recognizes that the successful implementation of any MSME insolvency regime will ultimately depend on the integrity, transparency and competence of a country's institutional framework and professionals. Emerging markets, in particular, might need to prioritize this piece of the insolvency regime before focusing on MSME-specific concerns. For instance, several African countries have both discharge and an IVA-type restructuring procedure, with minimal practice on the ground.²⁰⁶ A robust discussion of the institutional and professional fabric needed to support an MSME insolvency regime is outside the scope of this Report. However, some key considerations are set out below for future discussion.

DESIGNATING THE PROFESSIONALS WHO WILL HANDLE MSME INSOLVENCY AND DISCHARGE IS AN IMPORTANT PART OF DESIGNING THE SYSTEM

While liquidation-and-discharge proceedings in particular have traditionally been the province of court processes, other institutional structures may be superior for administration of MSME insolvency. States with deeply embedded traditions of judicial involvement in insolvency proceedings will likely retain this structure. But even longstanding and sophisticated regimes like that in England have increasingly concluded that the judiciary can be safely unencumbered and most insolvency administration assigned to an administrative agency. In the UK, Canada, and Australia, MSME insolvency and individual discharge has been successfully designated to a

separate agency. The English and Irish model of developing an entirely new infrastructure in the form of an Insolvency Service adds another layer of complexity that might not be necessary or appropriate for less developed states. Other models of assigning various agencies with the responsibility for administering discharge proceedings have been quite successful; for example, the Swedish approach leverages the existing expertise of the Enforcement Agency in dealing with defaulting debtors and the legal protections afforded them. These kinds of efficiencies should be encouraged, as it is on the whole preferable that the majority of uncontested discharge cases pass through a simple, semiformal process.

Concerns about due process and property rights protection can be adequately addressed by allowing creditors open access to a judicial re-examination of challenges to first-instance administrative determinations. This is the solution implemented by reformers in 2007 in the first and most extensive reform of the Swedish personal insolvency system.²⁰⁷ In the vast majority of MSME cases, if debtors cooperate with system administrators and do what the procedure objectively requires of them, they should receive an automatic discharge, whether or not this confers an objective benefit on creditors.²⁰⁸ Especially in countries with weak or overburdened court infrastructure, further encumbering the courts with personal insolvency cases and MSME cases is counterproductive and unnecessary.

Institutional support is especially vital in the MSME restructuring context. The information deficiencies and creditor apathy that often undermine MSME restructuring can be overcome

only by assigning a trusted intermediary to give individualized attention to each debtor's case and to offer creditors a succinct, credible assessment of the debtor's *bona fides* and the feasibility of the proffered restructuring proposal. It is vital to place these functions in an institution that gains and holds the trust of creditors, as the vote on restructuring plans will be powerfully impacted by the degree to which the chosen intermediary commands creditors' trust and confidence. The proper institutional choices here are absolutely crucial to the success of an MSME restructuring alternative, both in guiding and advising debtors and in interfacing credibly with creditors.

To formulate viable restructuring plans, MSME debtors are likely to need expert business advice in addition to the administrative support. A central authority may fill the role of counsellor and intermediary for debtors, in addition to the administration role, as is the case in the new Chilean regime. This approach has the potential added benefit of concentrating in one place both business advice and guidance for struggling small businesspeople, as well as insolvency resolution assistance when financial challenges become overwhelming. MSME debtors often fail due to insufficient support and guidance early in their lifecycles, a void that becomes more difficult to fill as problems mount and insolvency threatens or sets in. If a central authority like the Chilean Superintendent of Re-Entrepreneurship can offer small business support both before and after MSMEs experience distress, such enterprises will likely have a much greater degree of success in navigation of business challenges. Such agencies require adequate funding and staffing support, but this investment is likely to produce a much higher rate of return and long-term success than similar investments in after-the-fact restructuring processes.

A common approach, particularly in countries newly modernizing their insolvency systems, enlists the support of insolvency practitioners, usually licensed by a central regulatory authority. It is a deceptively simple solution, however, to

direct debtors to any lawyer or accountant willing to provide support for negotiated debt arrangement efforts. Particularly for states with underdeveloped professional infrastructure, this may be a less effective approach than the central authority. Careful oversight of practitioners is necessary. The South African debt adjustment process called "administration" is considered to have suffered from a lack of oversight and regulation of appointed administrators, a problem addressed in the new personal debt negotiation process under the National Credit Act, now led by debt counsellors regulated by a new National Credit Regulator.²⁰⁹ The approach of engaging a central regulatory authority is essential to ensure competency and honesty if private advisers are to be enlisted to guide debtors through a restructuring process.

THE KEY ROLE OF ATTITUDES AMONG PROFESSIONALS AND INSTITUTIONS

Successful regimes such as those in Japan and Republic of Korea seem to enjoy another crucial benefit that seems likely to be the primary driver of success: powerful institutions and a rescue-friendly insolvency culture. The reform movement in Japan was especially impactful not only on procedures, but on attitudes. One longtime commentator on Japanese insolvency law describes interviews with "key players in the legal and court practice" who reported "changing attitudes among the courts and practitioners" from a "political mandate from the reform movement," leading to an environment where courts and practitioners cooperated "to make the civil rehabilitation process more conducive to quick, efficient and acceptable resolutions."²¹⁰ He attributes much of the success of the Japanese reforms to the fact that "the revision signified and initiated a change in the various actors' posture, that is, in insolvency culture," ushering in "a renewed interest in and commitment to proactively reforming ... troubled businesses," and concluding that "the CRA was a symbolic gesture to a more expedient, user-friendly, and affirmative reorganization scheme."²¹¹

In Republic of Korea, a leading insolvency academic noted the embrace of a new rescue culture by judges in the mid-2000s. One judge described himself as “an evangelist of the bankruptcy-discharge church,” and another explained that “when he started to work on personal bankruptcy cases, he mostly worried about how to prevent the moral hazard regarding debtors, but after a few months of experience, he now focuses on how to help bankrupts.”²¹² As in the early development of the U.S. bankruptcy system, an enthusiastic insolvency culture is solidifying in Republic of Korea as the country implements a new system of specialized tribunals with exclusive jurisdiction over insolvency cases, beginning with the Seoul Bankruptcy Court, effective March 1, 2017.²¹³

Attitudes cannot be legislated, but must be considered in the design and reform of MSME

insolvency. New laws and legal structures are necessary but not sufficient. Supportive institutional attitudes seem to be largely responsible for MSME restructuring success on a national level. The famously rescue-friendly pioneering U.S. regime has been driven in part by legislation, but both that legislation and the results it has produced have been propelled by an underlying culture that believes in reorganization and second chances. A prominent history of U.S. bankruptcy law observes, “Since 1898, bankruptcy professionals have been the single most important influence on the development of bankruptcy law.”²¹⁴ American institutions, especially the dedicated Bankruptcy Courts and the professionals working within them, generally truly believe in the benefits of a policy of rescue and fresh start. This attitude has helped to create institutions that model effective and accessible support for reorganization.²¹⁵

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Preliminary Discussion of the World Bank Group Principles for Effective Insolvency and Creditor/Debtor Regimes

The Principles for Effective Insolvency and Creditor/Debtor Regimes (the “ICR Principles”) are a distillation of international best practices on key aspects of insolvency systems, emphasizing contextual, integrated solutions and the policy choices involved in developing those solutions. The Principles are used in connection with the World Bank Group program to develop Reports on the Observance of Standards and Codes (“ROSC”) and the joint IMF-World Bank Financial Sector Assessment Program (“FSAP”). These assessments have yielded a wealth of experience and enabled the World Bank Group to test the sufficiency of the ICR Principles as a flexible benchmark in a wide range of country systems. The ICR Principles are ultimately a collaboration of the World Bank Group with UNCITRAL, IAIR, and INSOL International.

The ICR Principles call for an integrated approach to reform, taking into account a wide range of laws and policies in the design of creditor/debtor regimes and insolvency systems. The ICR Principles have been designed to be sufficiently flexible to apply as a benchmark to all country systems and to embody several fundamentally important propositions. First, effective systems respond to national needs and problems. Second, transparency, accountability, and predictability are fundamental to sound credit relationships. Third, legal and institutional mechanisms must align incentives and disincentives across a broad spectrum of market-based systems — commercial, corporate, financial and social. The application of the Principles at the country level will be influenced by domestic policy choices and by the comparative strengths (or weaknesses) of applicable laws, institutions and regulations, as well as by capacity and resources.²¹⁶

The ICR Principles as currently formulated were initially focused on large business entity insolvency. While the ICR Principles can often be read flexibly to accommodate the concerns of MSMEs along with large corporate debtors, this Report emphasizes the need for the ICR Principles to incorporate features of insolvency regimes that particularly facilitate the insolvency process for MSMEs. There are two ways in which this can be done: (i) a new Principle could be introduced dealing with all the composite features of an MSME insolvency regime that countries are free to assess in the development of their insolvency legislation; or (ii) alternatively, several Principles might be modified or expanded to take into account the special circumstances and common treatment of MSMEs, whether natural persons or juridical entities. It should be highlighted that this Report is not intended to provide a full discussion on this topic, as amending the ICR Principles will ultimately depend on the final MSME insolvency system recommended by the ICR Task-Force and UNCITRAL. For this reason, the first option is most likely the clearest and most effective method for dealing with the evolving subject of MSME insolvency.

Regardless of which approach is taken, the new focus on MSMEs should be added not just to the ICR Principles, but to the Introduction and Summary of the official text. In each Summary section, a sentence or two on the relevance to MSMEs and availability of credit to them of aspects such as enforcement of collateral and debt, credit information systems, and insolvency system components should be inserted as integration to ensure understanding of the broadened scope of the ICR Principles.

ONE STAND-ALONE PRINCIPLE TO INCORPORATE MSME INSOLVENCY

The benefit of adding a single Principle (Part E) that addresses MSME insolvency is that this will promote greater coherence and consideration of MSME insolvency in one place, separate from the corporate framework. The importance of MSMEs, their number, and the percentage of economic actors would merit the separate section if one was created. Accordingly, specific considerations separate from the general framework could be highlighted and/or carved out. If this was done, then other Principles would not need to be amended. Instead of reading through various Principles to understand the framework, the one group of new criteria would cover all the aspects of MSME insolvency as set forth here. A downside could be that other Principles that cover the framework, institutions, and other relevant aspects may be incomplete. It may also be difficult to describe a whole MSME framework in countries where it has not been developed as a fully separate system, where the elements of the MSME approach are scattered throughout the law and institutional responsibilities overlap rather than having a dedicated MSME-specialized administrative body.

Although Part E cannot be completed until both the World Bank Group and UNCITRAL have finalized their approach in addressing MSME insolvency, based on this Report, any stand-alone Principle would contain the following elements:

A discharge should be made available to all natural persons following a liquidation process. Policy-makers should decide whether this discharge is applicable to all natural persons, regardless in what capacity they are operating, or only for natural persons operating as entrepreneurs or in a commercial capacity. This discharge should have the following features:

- Open access;
- Discharge of both personal and business debts;
- Specific, substantiated challenges to debtors' good faith in exceptional cases;
- Controlled costs by reducing formalities;

- Carefully constrained expropriation of current wealth and future income; and
- Limited civil restrictions and stigma.

A simplified, creditor-negotiated restructuring process should be included in insolvency legislation to encourage the rescue of viable MSMEs. This process should have the following features:

- Application to both natural persons and juridical persons.
- Open access, no maximum debt limits or minimum dividend requirements;
- Plan adoption by majority vote of unsecured creditors;
- Exclusion or deemed consent of creditors not participating;
- Plan confirmed absent specific objection for carefully defined abuse;

Although the institutional provisions in Part D should equally apply for MSMEs, Part E should set out institutional issues that might be of particular concern to MSME insolvency. This will include:

- The role of the insolvency regulator in administering MSME insolvency procedures, in particular, regarding any out-of-court procedures;
- The role of any other third-party intermediary (such as a mediator or an insolvency practitioner) in administering MSME insolvency procedures, in particular, regarding any out-of-court procedures;
- The role of the insolvency regulator in plugging various information deficiencies relating to MSME insolvency; and
- The role of a centralized institution in providing debt counseling and business advice.

AMENDING EXISTING ICR PRINCIPLES TO INCORPORATE MSME INSOLVENCY

Amending each ICR Principle to reflect concerns specific to MSMEs appears to be sub-optimal in so far as it weakens coherency and can lead to confusion for policy-makers implementing

reforms. That said, the following twelve Principles (or groups of Principles) stand out as having special implications for MSME cases.

Principle B2: Director Liability for Insolvent Trading

This issue did not arise as a prominent factor in any of the systems examined in this report, but the notion of pursuing company directors for damages for continuing to trade while insolvent, as the *Modular Approach* paper noted,²¹⁷ “may require some relaxation in terms of the expectations from small debtors.” This Principle might be amended to address this relaxation specifically. MSME entrepreneurs tend to have less access to sophisticated legal guidance that would prompt them to abide by an obligation to cease trading in the face of impending insolvency. They also tend to lack access to sophisticated accounting assistance that would indicate impending insolvency. The personal nature of much MSME business means proprietors are prone to overinvesting before recognizing failure. A specific note of a more lenient approach to MSME debtors might be appropriate.

Principle B3: Enabling Legislative Framework

Existence of a procedure or procedures for MSMEs and individuals merit their own mention within the legislative framework. The research and evidence reviewed here leads to the conclusion that insolvency systems must serve MSMEs to be maximally effective within the economy.

Principle B4.1: Role of Supervisor in Informal Workouts

Principle B4 might miss an opportunity by failing to mention the importance of a persuasive intermediary in the context of negotiations involving MSME entrepreneurs. While the financial supervisor should remain aloof, consistent with the regulatory role, an insolvency supervisor like the Chilean Superintendent mentioned in section III.B.3. may play a more active and salutary role in facilitating workouts involving MSMEs. Small-business people in particular can benefit greatly from guidance and

even representation in such contexts. Experience in France, Sweden, and Chile in particular (in contrast to mass failure in this context elsewhere in the world) demonstrates that a persuasive intermediary can be helpful, if not vital, to producing agreements in these lower-value cases.²¹⁸

Principle C1: Key Objectives and Policies

As with Enabling Frameworks, a key objective of an insolvency law should be its availability and effectiveness for MSMEs.

Principle C3-C4: Eligibility, Applicability and Access

Principle C3 mentions only legal entities, and so it should be expanded to include natural persons engaged in business. If it does, however, Principle C4 might be significantly expanded to address access restrictions unique to individuals. For example, modern personal and business insolvency regimes are often quite concerned with barring access to debtors who have engaged in a greater or lesser degree of fraud, or whose vaguely defined “bad faith” makes them ineligible for relief. These inhibit rescue and rehabilitation, often to the benefit of no one if the restrictions are overly broad and if access criteria pose a heavy burden on debtors at the outset. Other systems have been exceptionally restrictive on entry, especially for former or current businesspeople, who have struggled to establish certain insolvency in the face of fluctuating, unpredictable future income and business liabilities. It would be helpful for this Principle to reiterate or reflect the endorsement of open access balanced by creditors’ ability to challenge individual cases of fraud or misbehavior. Principle C4 might also be expanded, as flagged in the *UNCITRAL Legislative Guide* and elsewhere,²¹⁹ to address the notion of having one procedure to adjust all of an MSME entrepreneur’s debts, both business and personal.

Categories 3.1 and 3.2 should be added to Principle C3. C3.2 should cover MSMEs, and the questions asked should relate to the coverage of both individual entrepreneurs and corporate entity MSMEs. C4.5 should be added to C4, which

should ask about eligibility requirements for the MSME procedure as compared to the corporate reorganization procedure for larger entities. A preference that imminent, rather than actual insolvency, confer eligibility can also be added to C4 in C4.3.

Principle C7: Creditors' Committees

One of the key reforms to MSME regimes has been the consistent removal of creditors' committees and often formal meetings of creditors entirely. Principle C7's focus on the centrality of (and explicit preference for) creditors as an oversight mechanism, including their role in the appointment of an insolvency representative, might be appropriate for large-company insolvency, but it is seldom appropriate for MSME cases. This is especially true in the context of individual discharge proceedings, where creditors should play essentially no governance role.

Principle C8: The Estate and Exemptions, Disposable Income

While the discussion of enforcement of unsecured claims refers to footnote 2 on exemptions, there is no such reference in Principle C8. Reference to individual entrepreneurs should also be made in Principle C8. In addition, a more substantial discussion of exempt assets and especially income is warranted in Principle C8 and/or C14.1.

C12: Treatment of Stakeholder Rights and Priorities

As discussed earlier, the treatment of tax issues can determine the success or failure of insolvency cases and insolvency systems. C12.6 should be added to determine the extent to which public/tax claims are limited in ways that allow reorganization and fairness to other creditors in liquidation.

Principle C13: Claims Resolution

Many regimes for adjusting individual debts, including business debts, have simplified or scrapped the claims verification process (for

example, Netherlands, U.S., Japan, Republic of Korea). By no means in such cases "must [there] be a rigorous system of examining claims to ensure validity," especially in discharge procedures where little or no value is to be distributed on such claims. Specific reference might be made to assessing the cost-effectiveness of this process by reference to the reasonably anticipated dividend to be distributed on claims, with the possibility of a more robust process in cases where substantial distributions are anticipated.

Principle C14: Discharge following Liquidation

While Principle C14.5 addresses discharge pursuant to a plan of reorganization, no Principle seems to address the importance or terms of providing a (court- or agency-imposed) discharge to individual entrepreneurs, without creditor approval or a reorganization plan. If individual MSMEs are to be considered along with large corporate debtors, some mention of an imposed discharge would be appropriate here, perhaps with reference to the importance of maintaining debtors' human dignity in discharge proceedings and ensuring that the process releases their productive energy quickly. Along those same lines, some mention of the *quid pro quo* for this discharge would be useful here, for example, liquidation of non-exempt assets, payment plan, terms, assessment of disposable income. These key issues warrant mention in the MSME context.

Also, the discussion of discharge here offers very little detail, for example, on exceptions to discharge, which relate largely to individuals. For MSMEs in particular, the issue of the dischargeability (or other treatment) of tax-related debt is absolutely crucial to successful recovery. This Principle also crucially fails to address another most troublesome issue for individual entrepreneurs: anachronistic post-discharge restrictions on debtors' activities, such as acting as a company director or engaging in professional activity. If the goal is to reinvigorate entrepreneurial activity, aggressive post-insolvency restrictions are the best method of squelching that goal. These restrictions should be avoided.

Principles D1.2, D1.5: Role of Court or Administrative Agency

The focus on courts in Principle D1.2 misses the cost-reducing efforts of many systems to implement agency-administered insolvency processes for individuals (for example, Sweden, Chile). While it is extremely helpful to have specialized courts and judges, these institutions tend to be quite expensive, and specialized agencies can do and have done a fine job of administering well-functioning insolvency

systems. The Swedish *Kronofogdemyndighet* and the Irish Insolvency Service have done especially impressive work in administering and advancing the development of their respective personal insolvency systems, with only minor or backup court involvement. Principles D1.2 and D1.5 envision the possibility of agency action, but it might be useful to accentuate this cost-saving possibility, especially useful in the MSME context.



2018

**INSOLVENCY &
CREDITOR/DEBTOR
REGIMES (ICR)
TASK FORCE**

Friday, May 4, 2018





Summary of Main Issues Discussed at the World Bank Group 2018 ICR Task Force Meeting

4 MAY 2018 – WASHINGTON, DC

The 2018 ICR Task Force Members welcomed the presentation of the draft report. They also raised a number of topics to consider with respect to the final version of the report as well as to next steps. A number of views were expressed on how best to address those topics. Below is a summary of the major issues discussed at the Task Force Meeting, and suggestions for the final report and next steps.

Presumption of good faith

- Financial skullduggery exists in the developing world; could the proposal negatively affect access to credit?
 - This issue was strongly echoed by many Members from developing countries.
 - It was suggested that good faith could be the international baseline approach. However, separate guidelines could be introduced for jurisdictions where dishonesty was a major concern. This could entail including a standard principle with flexibility in implementation.
 - Monitoring will be challenging. Catching abuse of the good faith presumption will be important but it is difficult. Too heavy an approach may defeat the purpose of having a presumption. The system will not be able to verify that every single discharge is sought in good faith: That would create too much of an administrative burden and would be too expensive and slow.
- What happens if multiple discharges are requested? What is the treatment of each subsequent discharge?
 - Time periods for restrictions between discharges could be longer.
 - Each additional discharge could become progressively more difficult to provide a disincentive for abuse of the discharge system. Canada was discussed as an example of a country with this system in place (for example, a judge is required for additional discharges).
- To provide a strong deterrent to fraud or to providing misleading information before discharge, what sanctions should be in place?
 - Broadly, abuse falls into three categories: (i) non-disclosure of assets, (ii) transfer of substantial assets to friends/relatives/related parties, or (iii) preferential payments (payments which are intentionally made to friendly creditors).
 - Overall, Task Force Members thought a strong penalty should be in place for abuse of the good faith presumption. It was suggested that it could be a criminal offence if a debtor lies.

Discharge for the natural person entrepreneur as a primary goal of MSME insolvency

- What should be the effects of the discharge?
 - After discharge, should the framework impose restrictions on the debtor for a certain time? For example, should future wealth/income be garnished?
 - Provision of discharge must be balanced with the possibility that the entrepreneur will need to be provided with credit. The entrepreneur should be able to get back into

the market quickly and become productive again.

- The discharge must be reliably recorded to maintain a record of past discharges. Most developed countries have reliable credit bureaus that enable creditors to keep track of debtor information (such as the number of discharges). However, developing countries often have no reliable information. This will be another challenge in implementing the discharge system in developing countries.
- The Task Force discussed creditor participation at length.
 - Many Members described creditor participation as “scream or die”. Two issues were discussed under this heading: (i) If a creditor does not raise an objection, it is assumed to have consented; and (ii) creditors who do not participate will not have a vote.
 - If we only allow participating creditors to vote, banks (as large creditors) will control everything. Some Members suggested that a safeguard system for small creditors should be put in place (such as a gatekeeper, addressed further below).
- MSME insolvency cannot be addressed just by discharge. A comprehensive system of measures is required, including rules for enhanced information; the need to discuss issues with the banking sector, including provisioning; treatment of secured creditors (especially collateral and movable assets); the number of procedures; and incentives for debtors/creditors to use the system.
- The system established must detail conditions for obtaining a discharge and the consequences of a violation. This will enhance system transparency and predictability. Debtors should have to fully disclose financial information and assets.
- Debtors’ ability to use the proposed discharge should be capped at a certain amount of debt.

Business-related v. consumer debt

- A strong link to natural person discharge exists, and coordination/connection is needed between personal and company insolvency law.
- It is essential to ensure that the people discharged are really entrepreneurs and not just consumers running-up credit card debts.
- Some Members suggested treating business and consumer debt separately and differently. However, a number of Members did not think it would be possible in many cases to distinguish one from the other. They stated that it would be practically very difficult and burdensome to attempt to investigate and separate business from consumer debt.
- Legal jurisdiction should be considered. Some jurisdictions may not be able to have one law/jurisdiction deal with both consumer and business debt. This would be the case if one type of debt is in the jurisdiction of the federal government and the other in a state/provincial jurisdiction. This could lead to MSMEs in the same country receiving different treatment depending on the regional jurisdiction.

Should the system include a gatekeeper?

- Some Task Force Members suggested a role for a gatekeeper (for example, a trustee) who could help ensure the discharge is provided on a good faith basis and that creditors have a sufficient voice.
- A gatekeeper may work better in advanced jurisdictions with established practices for insolvency practitioners. In developing countries, such a role could have potential for: (i) increase in fraud/corruption; (ii) lower performing incentives if not paid sufficiently (for example, in no asset cases); and (iii) capacity issues with finding qualified practitioners.
- Should a system of spot audits be used in the absence of gatekeepers? Some Members suggested that spot audits have not been effective in countries where they have been required (for example, in the United States).

Institutional considerations

- Members raised the issue of whether institutional support can be provided in no income/no assets cases.
- Mediation/Alternative Dispute Resolution techniques should play a key role.
 - These techniques help mitigate the issue of overburdened courts.
 - They may help reduce stigma and be more culturally appropriate in some countries.
 - Should they be government sponsored? It was suggested that countries in Asia might provide inspiration for this form of government support.
- With respect to the role of courts, Task Force Members advised that procedures should take place outside the courts as much as possible – although courts cannot be avoided completely, especially if fraud is alleged.

Importance of language/stigma

- Use of terminology and language is important, especially for MSMEs where the stigma of having financial difficulties and/or using an insolvency framework may limit or suppress use of the framework. It was suggested stigma is particularly problematic with micro and small business owners.
- Communication and education of both creditor and debtor communities are important components in minimizing any stigma associated with use of an insolvency framework.

Dive deeper into country data

- The Report provides a description of systems. A deeper discussion of country-level data would be beneficial.

Consult further with creditors

- Task Force Members suggested that further consultations with creditors would be useful before Principles are proposed. This would permit investigation into whether the Report's proposals could compromise access to finance.

The MSME Report has components similar to the Treatment of Natural Person Insolvency Report

- The MSME Report and the Treatment of Natural Person Insolvency Report overlap in places. A suggestion was made to link/cross-reference the reports where this occurs. The World Bank Group team agreed, but noted that the MSME Report deals with all MSMEs regardless of legal form and that focusing on natural persons detracts from this point.

Spectrum of application

- Some Task Force Members expressed concerns that recommendations may not fit both micro as well as small and medium sized businesses. This is because recommendations for micro business have implications for questions of personal insolvency. A suggestion was made to exclude micro businesses and to focus on the other categories.

MSME World Bank ICR Principles.

- The Task Force expressed a preference for one or two Principles addressing MSMEs rather than a review/modification of many existing Principles to address specific MSME issues. The Members recommended that the Bank, along with its partners, should draft such Principles for consideration at the next Task Force Meeting. The Principles should reflect the Report's conclusions and the discussions of the Task Force.





Appendix 1: Acknowledgments

The Task-Force Co-Conveners Antonia Menezes and Andres F. Martinez, Senior Financial Specialists, along with Mahesh Uttamchandani, Global Practice Manager, Finance Competitiveness, and Innovation, World Bank Group, would like to acknowledge the following individuals (in alphabetical order) who participated in the 2018 Insolvency & Creditor/Debtor Regimes Task-Force and provided valuable contributions:

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ENDNOTES

1. World Bank Group *Report on the Treatment of MSME Insolvency* (2017), <https://openknowledge.worldbank.org/handle/10986/26709>.
2. A/CN.9/870 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/028/16/PDF/V1602816.pdf?OpenElement>
3. *See, e.g.*, 11 U.S.C. §§ 727(a)(1), 1129(a)(10) (denying a liquidation discharge to juridical entities, requiring the vote of at least one impaired class of non-insider creditors for a reorganization plan discharging creditors' claims).
4. That is, micro-enterprises, involving a single owner-entrepreneur and no formal business entity. Such businesses constitute at least 93% of the market in rich areas like the EU, *see* European Commission, *Annual Report on European SMEs 2015/2016*, at 4 (2016) (reporting 92.8% "micro" SMEs and 6% "small," with only 1.0% "medium" and 0.2% "large"), and probably more than 99% in developing areas in Africa, Asia, and South America.
5. *See* World Bank, Insolvency and Debtor/Creditor Regimes Task-Force, *Report on the Treatment of the Insolvency of Natural Persons*, 223-54 (2013). The treatment of debtor-entrepreneurs' personal residences, especially when such property is encumbered by a home mortgage, is particularly challenging. Only a few insolvency regimes around the world have developed solutions to this problem, with the overwhelming majority approach relegating this issue to lightly or wholly unregulated debtor-mortgagee negotiation.
6. *See, e.g.*, Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit In America* 338 (1999). For a discussion of the rising incidence of stigma among individuals seeking discharge relief, *see* Michael D. Sousa, "The Persistence of Bankruptcy Stigma" (2017), <http://ssrn.com/abstract=3048422>.
7. *See, e.g.*, Jason J. Kilborn, "The Rise and Fall of Fear of Abuse in Consumer Bankruptcy: Most Recent Comparative Evidence from Europe and Beyond," 97 *Texas L. Rev.* _ (forthcoming 2018), <http://ssrn.com/abstract=3116253>.
8. *See* 11 U.S.C. § 707(b) (the (in)famous "mean test," subjecting individual debtors to an evaluation of ability to pay creditors from future income under a payment plan, but only if their debts "are primarily consumer debts").
9. *See, e.g.*, World Bank, *above* note 5, 48; UNCITRAL, *Legislative Guide on Insolvency Law* 284 (2005) (concluding "it may not be feasible to have rules on business debts of natural persons that differ from the rules applicable to consumer debts").
10. *See* World Bank, *above* note 5, 367-71. On the particular challenge of treating or excluding secured debt, especially home mortgage debt, *see* *above* note 5.
11. *See, e.g.*, World Bank, *above* note 5, 223-254.
12. Even the reduced three-year plan in these countries inhibits entrepreneurialism and depresses long-term potential, however, as indicated by interviews with entrepreneurs in the Dutch personal debt adjustment procedure.

- See below Section II.C.1. While the European Commission has endorsed partial repayment plans like the ones imposed in Scandinavia and the Netherlands, it has not endorsed a three-year period as a *minimum* standard; rather, the Commission has suggested an *upper* limit of “no longer than three years” in most cases, allowing for a less inhibiting, shorter discharge period, as well. See European Commission, Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 2016/0359 (COD), at 22, 49.
13. For a more detailed discussion of these sensitive topics, see World Bank, *above* note 5, 262-309.
 14. See Brayden McCarthy & Karen Gordon Mills, “The State of Small Business Lending: Credit Access During the Recovery and How Technology May Change the Game,” Working Paper 15-004, Harvard Bus. Sch., July 22, 2014.
 15. Walter Pakter, “The origins of bankruptcy in medieval canon and Roman law,” in *Proceedings of the Seventh International Congress of Medieval Canon Law* 485, 488 (Peter Linehan, ed., 1988); J.H. Dalhuisen, *Dalhuisen on International Insolvency and Bankruptcy* § 202[1] (1986).
 16. Max Kaser & Karl Hackl, *Das Römische Zivilprozessrecht* §§ 57-58, 76, 96 (1996).
 17. *Id.* § 61.
 18. See Pakter, *above* note 14, at 488.
 19. See *id.* 505-06; Dalhuisen, *above* note 14, § 3.02[1]; Jason J. Kilborn, “Foundations of Forgiveness in Islamic Bankruptcy Law: Sources, Methodology, Diversity,” 85 *Am. Bankr. L.J.* 323 (2011); Thomas Mitrano, “The Chinese Bankruptcy Law of 1906-07: A Legislative Case History,” 30 *Monementa Serica* 259, 263-65 (1972).
 20. Donna McKenzie Skene & Adrian Walters, “Consumer Bankruptcy Law Reform in Great Britain,” 80 *Am. Bankr. L.J.* 477, 482-83 (2006); Adrian Walters, “Personal Insolvency Law After the Enterprise Act: An Appraisal,” 5 *J. Corp. L. Studies* 65 (2005).
 21. For a fairly comprehensive list of law & economics articles supporting the proposition that insolvency reform spurs entrepreneurial growth, all focusing on the effect of a liberal discharge, and ignoring or minimizing other aspects of the insolvency regime, see Douglas J. Cumming, “Measuring the Effect of Bankruptcy Laws on Entrepreneurship across Countries,” 16 *J. Entrepreneurial Finance* 80, (2012) (criticizing the neglect of attention on *personal* bankruptcy laws, the principle if not exclusive purpose and effect of which is to discharge unpaid debt).
 22. For the history of the Danish law, see Jason J. Kilborn, “Twenty-Five Years of Consumer Bankruptcy in Continental Europe: Internalizing Negative Externalities and Humanizing Justice in Denmark,” 18 *Int’l. Insol. Rev.* 166 (2009).
 23. Marie-Danielle Schödermeier & Françoise Pérochon, “National Report for France,” in *Principles of European Insolvency Law* 237, 303 (W.W. McBryde, A. Flessner, & S.C.J.J. Kortmann, eds., 2003).
 24. For a history of the spread of consumer discharge laws in Europe, see Jason J. Kilborn, *Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010*, at 18-21 (2011).
 25. See European Commission, *above* note 12.
 26. Lasse Højlund Christensen, “National Report for Denmark,” in *Principles of European*

- Insolvency Law* 153, 190 (W.W. McBryde, A. Flessner, & S.C.J.J. Kortmann, eds., 2003); Axel Flessner, “National Report for Germany,” in *Principles of European Insolvency Law* 313, 368 (W.W. McBryde, A. Flessner, & S.C.J.J. Kortmann, eds., 2003).
27. For a discussion of this range of values, see World Bank, *above* note 5, 56-111 (2013).
 28. John Armour, “Personal Insolvency and the Demand for Venture Capital”, 5 *Eur. Bus. Org. L. Rev.* 87 (2004); Wei Fan, Michelle J. White, “Personal Bankruptcy and the Level of Entrepreneurial Activity”, 46 *J. L. & Econ.* 543 (2003).
 29. *See above* note 20.
 30. For a discussion of these and related goals, see World Bank, *above* note 5, 79-98.
 31. For a particularly salient example of these negative effects, and a context where a personal insolvency discharge could be most beneficial in disciplining unregulated lenders, see Lerong Lu, “‘Runaway bosses’ in China: Private lending, credit crunches and the regulatory response,” *Financial Regulation Int’l*, issue 18.9, Nov. 2015, at 1-7.
 32. *See, e.g.*, Antonia Menezes & Andres Martinez, “Micro, Small and Medium Enterprise Insolvency in Africa: a comparative study,” www.uncitral.org/uncitral/en/commission/colloquia/50th-anniversary-papers.html.
 33. Sebastian Kortmann et al., “National Report for the Netherlands,” in *Principles of European Insolvency Law* 487, 523 (W.W. McBryde, A. Flessner, & S.C.J.J. Kortmann, eds., 2003).
 34. *Schuldsanering (ex-)ondernemers* § 4.2 at 177 (A.J. Noordam, ed., 2013).
 35. L. Combrink-Kuiters, S.L. Peters, and C. Verkleij, *Monitor Wsnp: Twalfde meting over het jaar 2015*, 24-25 & tbl. 3.2 (2016).
 36. *Id.* at 27-28 & tbls. 3.13 and 3.14 (reporting for 2015 average entrepreneur monthly income of €1560 and debt of €90,320, double the average debt level for consumers).
 37. *Id.* at 37-38 & tbls. 3.6b and 3.6c (also reporting that former entrepreneurs managed to secure agreed compromises with creditors in an additional nearly 6% of cases).
 38. *See* Jason J. Kilborn, “The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New U.S. Law From Unexpected Parallels in the Netherlands,” 39 *Vanderbilt J. Transnat’l L.* 77, 97-105 (2006).
 39. Noordam, *above* note 33, §§ 4.5-4.6, 5.1, 5.5.4 (noting some courts make exception for sole proprietors with no employees, though the tax authorities require business liquidation as a condition of any *akkord* workout).
 40. *Id.* § 5.1.3.
 41. Jennifer van Kesteren, Jan Adriaanse, & Jean-Pierre van der Rest, “The Story Behind Bankruptcy: When Business Gets Personal,” 17 *QUT L. Rev.* 57, 66, 69 (2017).
 42. *See generally* Matilde Cuenca Casas, “La exoneración del pasivo insatisfecho,” in *Comentarios a la Ley de Mecanismo de Segunda Oportunidad* 65 (Matilde Cuenca Casas et al., eds., 2016).
 43. Ley Concursal art. 178 bis. [Spain].
 44. Insolvenzordnung (InsO) §§ 286-303. On the development of the new German law, see Jason J. Kilborn, “The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States,” 24 *NORTHWESTERN J. INT’L L. & BUS.* 257 (2004).
 45. Insolvenzordnung (InsO) § 26.
 46. *See* Kilborn, *above* note 43, at 278-79 & n. 129; InsO § 4a.
 47. InsO § 286.
 48. InsO § 304. In addition, simplified proceedings must be preceded by an out-of-court workout attempt, which usually fails. The court has

- an option to attempt another, court-backed workout negotiation, and a plan in this context can be approved by the acceptance (or non-response) of only half of creditors by number and value of claims. Courts have seldom engaged this second attempt, however, and only about 1-2% of cases conclude with such a plan. See Kilborn, *above* note 43, at 276-77; InsO § 306(1); Jan Heuer, *Anwaltliche Schuldner- und Verbraucher-insolvenzberatung: Eine explorative Studie zur Rechtswirklichkeit anwaltlicher Insolvenzberatung im Rahmen des § 305 InsO* 50 (2009).
49. InsO § 287(2).
 50. InsO § 300.
 51. Heuer, *above* note 47, at 51; Jan Heuer et al., *Der aussergerichtliche Einigungsversuch im Verbraucher-insolvenzverfahren: Inkasso-Unternehmen als Datenquelle für Verschuldungsuntersuchungen* 23 (2005).
 52. Statistisches Bundesamt, *Insolvenzen von Unternehmen und Übrigen Schuldern* (2017).
 53. InsO § 295(2).
 54. For the history of the Danish law, see Kilborn, *above* note 21.
 55. Betænkning nr. 1449/2004 om gældssanering, pp. 340-42, 351-54.
 56. Konkurslov §§ 231b, 236a(2).
 57. Gældssaneringsbekendtgørelsen § 2 (last amended 2009).
 58. Betänkande av Nystartsutredningen, *F-skuldsanering—en möjlighet till nystart för seriösa företagare*, SOU 2014:44, at 127, 238.
 59. Konkurslov §§ 231, 232.
 60. SOU 2014:44, *above* note 57, at 126.
 61. Konkurslov § 231a(4).
 62. Data compiled from historical official court statistics on probate and bankruptcy, latest years online at <http://www.domstol.dk/om/talogfakta/statistik/Pages/skiftesager.aspx>.
 63. SOU 2014:44, *above* note 57, at 329. This is notably consistent with Dutch and German data, reported above.
 64. *Id.* at 131-32.
 65. On the history and operation of the Swedish law, see Jason J. Kilborn, “Out with the New, In with the Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?,” 80 *AM. BANKR. L.J.* 435 (2007).
 66. SOU 2014:44, *above* note 57, at 35-36 (providing an English-language summary of the proposal).
 67. *Id.* at 31.
 68. Lag (2016:676) om skuldsanering för företagare. The ordinary personal debt adjustment procedure is called *Skuldsanering* (debt adjustment), and the added *F-* stands for *företagare* (entrepreneurs).
 69. The Enforcement Agency emphasizes this “sameness” in its introductory comments on the new process. See *Skuldsanering för företagare*, www.kronofogden.se/skuldsaneringforetagare.html; Nytt från den 1 november 2016, www.kronofogden.se/skuldsaneringnyttforstanovember.html.
 70. Actually, one-seventh of the *prisbasbelopp*, an indexed social-benefit measure, which for 2017 is 44,800 kronor. *Prisbasbeloppet för år 2017*, https://www.scb.se/sv/_Hitta-statistik/Statistik-efter-amne/Priser-och-konsumtion/Konsumentprisindex/Konsumentprisindex-KPI/33772/33779/Behallare-for-Press/406706/.
 71. Lag (2016:676) om skuldsanering för företagare §§ 9(3), 36.
 72. Lag (2016:676) om skuldsanering för företagare §§ 8, 9(1).
 73. SOU 2014:44, *above* note 57, at 370-71 (noting in particular that shoddy bookkeeping should generally exclude an active entrepreneur from the procedure).

74. *Id.* at 113-14.
75. Kronofogden, Ärendestatistik, https://www.kronofogden.se/download/18.28b9f2671590d52c89baaab/1487148199196/detaljerad_statistik_skuldsanering_2007_2016.pdf.
76. See Simeon Djankov et al., “Debt Enforcement Around the World,” 116 *J. Pol. Econ.* 1105, 1146-47 (2008).
77. See Janis P. Sarra, *Micro, Small and Medium Enterprise (MSME) Insolvency in Canada* 45 (2016), <http://ssrn.com/abstract=2862039>; Office of Superintendent of Bankruptcy Canada, Consumer Proposals, <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02051.html>; Office of the Superintendent of Bankruptcy Canada, Division I Proposals, <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02052.html>.
78. Adrian Walters, “Individual Voluntary Arrangements: A ‘Fresh Start’ for Salaried Consumer Debtors in England and Wales?,” 18 *Int’l Insol. Rev.* 5, 18, 30 (2009).
79. *Id.* at 17-19; Insolvency (England and Wales) Rules 2016, S.I. 2016/1024, § 15.34(6)(a).
80. See Walters, *above* note 78, at 17.
81. Insolvency (England and Wales) Rules 2016, S.I. 2016/1024, § 8.3(r) (requiring discussion in IVA proposal, “if the debtor has any business, how that business will be conducted during the IVA”).
82. Keith Pond, *Investigating personal insolvency: a progression of studies into individual voluntary arrangements* 197 (Loughborough Univ. PhD diss. 2003), [//dspace.lboro.ac.uk/dspace/bitstream/2134/3039/1/KeithPondPhD.pdf](https://dspace.lboro.ac.uk/dspace/bitstream/2134/3039/1/KeithPondPhD.pdf).
83. See Walters, *above* note 78, at 9-10 & tbl. 1.
84. Pond, *above* note 82, at 218.
85. The Insolvency Service, *Individual Voluntary Arrangements: Outcome Status and Provider Breakdown, 1990-2015, England & Wales* 4 & fig. 3, 6 & tbl. 1 (2017).
86. These two proposal types are often referred to as “commercial” and “consumer,” respectively, but they are referred to here instead as unrestricted and restricted to emphasize, as discussed in this section, that business debts can be and are restructured in *both* proceedings, so long as the restrictions in Division II are satisfied.
87. See Sarra, *above* note 77, at 8-11.
88. As defined by official statistics as involving debtors with a majority of business-related debt; see also Sarra, *id.* at 9, 46 (noting use of Division II Proposal by micro-entrepreneurs).
89. Office of The Superintendent of Bankruptcy Canada, *Insolvency Statistics in Canada: First Quarter of 2017* tbls 2-3.
90. See Sarra, *above* note 77, at 33-34 (noting that some “successes” may involve going-concern sales).
91. See Australian Financial Security Authority, *Compare the Formal Options*, <https://www.afsa.gov.au/insolvency/i-cant-pay-my-debts/compare-formal-options>.
92. See Vivien Chen, Lucinda O’Brien & Ian Ramsay, “An Evaluation of Debt Agreements in Australia,” 44 *Monash Univ. L. Rev.* — (forthcoming 2018).
93. New Administrations Under the Bankruptcy Act 1966 Statistics (Provisional) 2015-16, release no. 143 (2016).
94. Chen et al., *above* note 117, figs. 4, 7 and accompanying text.
95. *Id.* figs. 9, 11 and accompanying text.
96. Junichi Matsushita, “Japan’s Personal Insolvency Law,” 42 *Texas Int’l L.J.* 765, 768 (2006).
97. For a description of the SSD process, see Etsuko Sugiyama, *Insolvency Proceedings for MSMEs in Japan* 6-8 (working paper for UNCITRAL Working Group V 51st session, May 2017).

98. It is also similar to the U.S. Chapter 13 process, and ironically, the SSD procedure is contained in Chapter 13 of the Civil Rehabilitation Act. An alternative, court-confirmed plan procedure (based on disposable income) is available for debtors with “salary or similar regular income” that has not and is not expected to fluctuate by 20% or more, but in light of the unpredictable nature of entrepreneurs’ income, this procedure will not be addressed here.
99. Secured claims are unaffected, though collateral can be redeemed from secured claims by paying a lump sum of the collateral’s value. *Cf.* 11 U.S.C. § 722 (available in the U.S. only in a Chapter 7 liquidation).
100. The scale has five tranches of minimum dividends: (1) 100% when claims total less than 1 million yen (US\$9000); (2) 1 million yen (US\$9000) when claims total between 1 and 5 million yen (thus, between 100% and 20% of claims, declining as their total volume rises toward US\$45,000); (3) 20% when claims total between 5 and 15 million yen (US\$135,000); (4) 3 million yen when claims total between 15 and 30 million yen (thus, between 20% and 10%, declining as claims volume rises toward US\$270,000); and (5) 10% when total claims exceed 30 million yen. Also, payments on these minimum dividends must be distributed at least quarterly.
101. Matsushita, *above* note 96, at 768.
102. *Id.* at 766, 769-70. An additional 8077 (29% of the total) were “salaried worker” cases, and that same year saw nearly 230,000 bankruptcy filings. *See id.* at 766.
103. *See Follow-up Survey of Companies Applying for “Civil Rehabilitation,”* http://www.tsr-net.co.jp/news/analysis/20170113_07.html (Jan. 13, 2017) (in Japanese), *cited in* Sugiyama, *above* note 106, at 2.
104. Ley de Insolvencia y Reemprendimiento No. 20.720 (D.O. 9 Jan. 2014), effective 9 October 2014.
105. *See* <http://www.superir.gob.cl/>; Ley de Insolvencia y Reemprendimiento No. 20.720 art. 266.
106. Ley de Insolvencia y Reemprendimiento No. 20.720 arts. 265-267. If the plan is not confirmed, the case is routed to a liquidation proceeding, which culminates in a discharge for the debtor. *Id.* arts. 268, 281.
107. Superintendencia de Insolvencia y Reemprendimiento, Boletín Estadístico: Procedimientos Concursales, 6 (Feb. 2017) (reporting data from 9 Oct. 2014 to 31 Jan. 2017, on file with author). During this same period, only 1605 personal liquidation cases were initiated, most of which remain open, likely for investigation of assets. *Id.* at 7.
108. *Id.* at 16.
109. Superintendencia de Insolvencia y Reemprendimiento, Boletín Estadístico: Procedimientos Concursales – Ley No. 20.720, at 14 (July 2017).
110. Bankruptcy Act of 1898 §§ 1051-52 (repealed).
111. 11 U.S.C. §§ 1322, 1325.
112. Scott F. Norberg & Andrew J. Velkey, “Debtor Discharge and Creditor Repayment In Chapter 13,” 39 *Creighton L. Rev.* 473 (2006).
113. 11 U.S.C. § 1322(b)(1)(B).
114. Criticism of the means test is abundant; *see, e.g.*, Jason J. Kilborn, “Still Chasing Chimeras But Finally Slaying Some Dragons in the Quest for Consumer Bankruptcy Reform,” 25 *Loyola Consumer L. Rev.* 1, 6-9, 11-13 (2012).
115. 11 U.S.C. § 1325(a)(4). This is the so-called “best interests of creditors” test.
116. *See* Arthur L. Moller, “It Isn’t Only for Wage Earners Anymore: The Individual in Business and Chapter 13 of the Bankruptcy Code,” 17 *Houston L. Rev.* 331 (1980).
117. 11 U.S.C. § 1304.

118. 11 U.S.C. § 1325(b)(2) (emphasis added).
119. 11 U.S.C. § 109(e). These figures are indexed for inflation every 3 years, due again in 2019. 11 U.S.C. § 104.
120. Bankr. Rule 3015(b); 11 U.S.C. § 1326.
121. Fed. R. Bankr. P. 2003.
122. 11 U.S.C. § 1324(b). A ruling on confirmation of the plan is often continued for as long as a year as a result of ongoing negotiations or court congestion, but the potential for swift plan consideration nonetheless looms.
123. 11 U.S.C. § 1307(c).
124. Wenli Li, Federal Reserve Bank of Philadelphia, “What Do We Know About Chapter 13 Personal Bankruptcy Filings?,” *Bus. Rev.*, Q4 (2007), at 19, 24 & tbl. 2; Ed Flynn, “Chapter 13 Case Outcomes by State,” 8 *Am. Bankr. Inst. J.*, Aug. 2014 at 40, 41.
125. *See, e.g.*, Li, *id.*; Norberg & Velkey, *above* note 112.
126. *See* Robert M. Lawless & Elizabeth Warren, “The Myth of the Disappearing Business Bankruptcy,” 93 *Cal. L. Rev.* 743, 749-68 (2005).
127. Admin. Office of U.S. Courts, U.S. Bankruptcy Courts, Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending March 31, 2017, tbl. F-2 (indicating only 2222 “business” Chapter 13 filings of a total of nearly 300,000, but only 6003 “business” Chapter 11 filings).
128. *See, e.g.*, Robert M. Lawless, “Striking Out on Their Own: The Self-Employed in Bankruptcy,” in *Broke: How Debt Bankrupts the Middle Class* 101, 104-06 (Katherine Porter, ed., 2012); Lawless & Warren, *above* note 126, at 773 & tbl. 2, 747, 782-83 (2005); Elizabeth Warren & Jay Lawrence Westbrook, “Financial Characteristics of Business in Bankruptcy,” 73 *Am. Bankr. L.J.* 499 (1999).
129. *See* Ministry of Justice, Republic of Korea, *Special Rehabilitation Proceedings for MSMEs* 2 (working paper for UNCITRAL Working Group V 51st session, May 2017); Soogeun Oh, “Personal Bankruptcy in Korea: Challenges and Responses,” 7 *Theoretical Inquiries in Law* 597, 609 (2006).
130. Ministry of Justice, *id.*, at 3-5; Oh, *id.*, at 609-611.
131. *See* Lawless, *above* note 128, at 112-13.
132. Ministry of Justice, *above* note 129, at 11-12.
133. *Id.* at 13.
134. UNCITRAL, *Legislative Guide on Insolvency Law* 9-14 (2005).
135. *See, e.g.*, Theodore Eisenberg & Shoichi Tagashira, “Should We Abolish Chapter 11? The Evidence From Japan,” 23 *J. Legal Stud.* 111 (1994).
136. In a survey of Canadian trustees, 74% responded that no new source of financing for MSME insolvency should be developed; the market provides a sufficient financing vetting process. *See* Sarra, *above* note 77, at 58-59.
137. *See, e.g.*, National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* 612 (1997), <http://govinfo.library.unt.edu/nbrcreporttitlepg.html> (noting the view of “many of the experienced individuals who appeared before the Working Group,” that the “primary reason for the low Chapter 11 confirmation rate is that the great majority of Chapter 11 debtors lack any genuine prospect for reorganization”); *but cf.* American Bankruptcy Institute Commission to Study the Reform of Chapter 11, *Final Report and Recommendation*, 285, 299 (2014) [hereinafter ABI Report] (noting the many economic, operational reasons why many small businesses fail, and noting widespread disagreement on the causes and solutions to this problem, but expressing a belief that “many of these SMEs were failing not because of fatally flawed business models, but because they

- were not receiving the assistance they needed in the context of a financial restructuring”).
138. See Elizabeth Warren & Jay Lawrence Westbrook, “The Success of Chapter 11: A Challenge to the Critics,” 107 *Mich. L. Rev.* 603, 618-20 (2009); see also Ann Lawton, “Chapter 11 Triage: Diagnosing A Debtor’s Prospects for Success,” 54 *Ariz. L. Rev.* 985, 1004, 1025 (same, and noting that this failure may be caused not by procedural costs, but “if it is the *debtors* and not some deficiency in the *process* that cause low confirmation rates, then tinkering with the process will not improve success rates in Chapter 11”).
 139. See Douglass G. Baird & Edward R. Morrison, “Serial Entrepreneurs and Small Business Bankruptcies,” 105 *Columbia L. Rev.* 2310 (2005).
 140. See Edward R. Morrison, “Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies,” 50 *J. L. & Econ.* 381 (2007) (finding *no* such continuation bias and an aggressive practice by Chicago bankruptcy courts of dismissing likely reorganization failures early); Warren & Westbrook, *above* note 128, at 626 (noting that U.S. bankruptcy courts in their sample terminated likely reorganization failures early, with 33% of cases dismissed within 6 months, about 50% within 9 months, and of the clearly “dead on arrival” cases, 70% were ejected from the system within 9 months of filing). Both of these articles’ conclusions are critically reliant on context, though, as they study sophisticated, specialized US bankruptcy judges. Institutions matter.
 141. ICR Principles at 1 (2016); see also Warren & Westbrook, *above* note 128, at 625 (“Any thoughtful evaluation of Chapter 11 eventually boils down to weighing the costs and benefits.”).
 142. ABI Report, *above* note 137, at 279.
 143. NBRC Report, *above* note 137, at 618.
 144. Lawton, *above* note 138, at 1006.
 145. See European Commission, *above* note 4, at 3 (defining “micro” as fewer than 10 employees and less than €2 million in total asset value, “balance sheet total”, while “medium” enterprises have more than 50 employees and between €10 and €40 million in total assets); Jeffrey D. Goetz & Mark S. Melickian, *Small Chapter 11/Big Chapter 11: A Tale of Two Cities* 5 (presentation to 32nd Annual Bankruptcy Conference of Iowa Chapter of Federal Bar Association, Oct. 25, 2013)(noting U.S. practitioners categorization of SME Chapter 11 debtors as “small” if they have assets or debts from \$2 million to \$10 million, and mid-market (medium) if they have assets or debts from \$10 million to \$50 million).
 146. See Sarah Paterson, “Debt Restructuring and Notions of Fairness,” 80 *Modern L. Rev.* 600 (2017); Bolane Adebola, “An Invitation to Encourage Due Consideration for the Survivability of Rescued Businesses in the Business Rescue System of England and Wales,” 26 *Int’l. Insol. Rev.* 129 (2017); Gerard McCormack, “National Report for England,” in *Commencement of Insolvency Proceedings* 234, 240-41 (Dennis Faber et al., eds., 2012).
 147. NBRC Report, *above* note 137, at 610.
 148. *Id.* at 609.
 149. *Id.* at 616-17. For enthusiastic discussions of these other recommendations by sitting judges, see Hon. Thomas A. Small, “Small Business Bankruptcy Cases,” 1 *Am. Bankr. Inst. L. Rev.* 305 (1993); Hon. Thomas A. Small, “If you ‘Fix It, They Will Come – A New Playing Field for Small Business Bankruptcies,” 79 *Am. Bankr. L.J.* 981 (2005); Hon. James B Haines & Philip J. Hendel, “No Easy Answers: Small Business Bankruptcies After BAPCPA,” 47 *Boston College L. Rev.* 71, 94-102 (2005).
 150. Many of these Chapter 11 modifications had been used in MSME cases since the late 1980s by individual bankruptcy judges, with notable

- success, though without elaborate reporting and oversight rules. *See* Small, *id.*
151. The point made in the first *Report on the Treatment of MSME Insolvency* at p. 36, about the lack of a maximum duration for MSME Chapter 11 plans, is a contrast with and benefit over Chapter 13 (for individuals only), which limits plans to 60 months. This is not an advantage of the “small business” provisions over other Chapter 11 cases.
 152. 11 U.S.C. § 1125(f). The Commission considered the disclosure statement process a key stumbling block and venue for abuse, especially in small business cases. *See* NBRC Report, *above* note 137, at 636-37.
 153. 11 U.S.C. §§ 1121(e)(1)-(2), 1129(e).
 154. 11 U.S.C. § 1121(e)(3).
 155. 11 U.S.C. § 1121(d).
 156. 11 U.S.C. §§ 101(51C).
 157. This figure is indexed for inflation every three years and currently stands at US\$2.556 million.
 158. 11 U.S.C. § 101(51D).
 159. *See* NBRC Report, *above* note 137, at 642 (noting a committee had been appointed in only 15% of Chapter 11 cases filed during a recent three-year period); Ann Lawton, “Chapter 11 Triage: Diagnosing a Debtor’s Prospects for Success,” 54 *Ariz. L. Rev.* 985, 1006 (2012) (noting committee formation in only 18% of cases in sample 2004).
 160. 11 U.S.C. §§ 308, 1116.
 161. *Id.*; 28 U.S.C. § 586(a)(7), (8).
 162. *Id.*; 11 U.S.C. § 1112.
 163. Fed. R. Bankr. P. 1020.
 164. Margaret Howard, “National Study of Individual Chapter 11 Bankruptcies,” 25 *Am. Bankr. Inst. L. Rev.* 61, 92-93 (2017).
 165. Bob Lawless, “The Disappearing Small Businesses (Designation) in Bankruptcy,” *Credit Slips* (Apr. 30, 2010, 10:26 AM), <http://www.creditslips.org/creditslips/2010/04/the-disappearing-small-businesses-designation-in-bankruptcy.html>.
 166. *Id.* (comment posted by AMC on April 30, 2010, 1:11 PM).
 167. Ed Flynn & Phil Crewson, *Chapter 11 Filing Trends in History and Today* 4 (2009), www.justice.gov/ust/eo/public_affairs/articles/docs/2009/abi_200905.pdf.
 168. *See* pp. 30-35.
 169. *See* Menezes & Martinez, *above* note 45 (OHADA).
 170. Samoladas, Dorotheos, and Christina Kalogeropoulou. “Greece.” *The Restructuring Review* 10 (September 2017). <https://thelawreviews.co.uk/chapter/1147024/greece>.
 171. The stand-alone CVA with a moratorium has been available since 2000 only for “small” companies, as defined in section 382 of the Companies Act 2006, but this procedure has been all but moribund. *See* Adrian Walters & Sandra Frisby, *Preliminary Report to the Insolvency Service into Outcomes in Company Voluntary Arrangements* 10 (2011) (unpublished manuscript on file with author) (reporting only 1% of the sample with a CVA with moratorium).
 172. *See* McCormack, *above* note 146, at 236.
 173. *See* Sarra, *above* note 77, at 17 (reporting on interviews with UK Insolvency Service and IPs).
 174. Walters & Frisby, *above* note 171, at 5, 8-9.
 175. *Id.* at 30.
 176. *See above* note 83 and accompanying text.
 177. The Insolvency Service, *Insolvency Statistics – January to March 2017 (Q1 2017)*, at 5 tbl. 1, 9 fig. 6 (2017).

178. Keith Pond, "The Individual Voluntary Arrangement Experience," *J. Bus. L.*, Mar. 1995, at 118 (1995).
179. See David A. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law in America* 98-127 (2001).
180. Eugene V. Rostow & Lloyd N. Cutler, "Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act," 48 *Yale L.J.* 1334, 1334, 1338-40, 1345 (1939).
181. *Id.* at 1334.
182. *Id.* at 1337-38, 1340-44, 1362-72; Skeel, *above* note 179, at 126-27, 162-65.
183. Skeel, *above* note 179, at 168-230.
184. See Kent Anderson, "Small Business Reorganizations: An Examination of Japan's Civil Rehabilitation Act Considering U.S. Policy Implications and Foreign Creditors' Practical Interests," 75 *Am. Bankr. L.J.* 355, 358 (2001).
185. *Id.* at 356, 361; see also Sugiyama, *above* note 97, at 1 (noting the deficiencies of the composition process); Eisenberg & Tagashira, *above* note 135 (describing the Composition Law process and results).
186. See Anderson, *above* note 184, at 364 (noting the most significant early CRA proceeding, Sogo Department Store, with a debt load of over US\$18 billion).
187. *Follow-up Survey*, *above* note 103, see also Sugiyama, *above* note 106, at 2 (noting the same trend).
188. *Id.* at 766, 769-70. An additional 8077 (29% of the total) were "salaried worker" cases, and that same year saw nearly 230,000 bankruptcy filings. See *id.* at 766.
189. See Stacey Steele & Chun Jin, "Some Suggestions From Japan for Reforming Australia's Personal Bankruptcy Law," 17 *QUTL Rev.* 74, 89 (2017).
190. See Anderson, *above* note 184, at 367-68.
191. *Id.* at 369, Civil Rehabilitation Act art. 25(iii)-(iv) (Japan).
192. A study of all CRA cases filed from 2000 to 2016 by business entities with debt totaling at least 10 million yen (US\$90,000) reported 96% successful case commencement. *Follow-up Survey*, *above* note 103; Sugiyama, *above* note 97, at 2. The rejection rate might be higher for cases involving less debt or individual debtors.
193. Sugiyama, *above* note 97, at 3 (noting that the debtor can redeem collateral by paying its value into court).
194. *Id.* at 3-4.
195. See Civil Rehabilitation Act art. 155(3) (Japan).
196. Sugiyama, *above* note 97, at 4; see also Anderson, *above* note 184, at 395 (noting that a supervisor is usually appointed to monitor the debtor's execution of the plan in Tokyo and Nagoya).
197. Sugiyama, *above* note 97, at 2.
198. *Follow-up Survey*, *above* note 103.
199. Ministry of Justice, *above* note 129, at 1.
200. See *above* section III.C.2.
201. Ministry of Justice, *above* note 129, at 2, 6.
202. *Id.* at 6-12 .
203. *Id.* at 11. If the 144,000 IRP debtors with "salary" income are included, they overwhelm the statistics, at ten times the number of "business income" IRP debtors, and 330 times the number of individual SRP cases.
204. *Id.* at 13 (50.4% for corporate SRPs, 46.9% for individual SRPs).
205. *Id.*
206. World Bank Group Insolvency & Debt Resolution Team country projects, which have not been specified for confidentiality reasons.

207. See Kilborn, *above* note 64, at 460-61.
208. See World Bank, *above* note 5, 207-16.
209. See Deborah James, *Money from Nothing: Indebtedness and Aspiration in South Africa* 61, 76, 87 (Stanford Univ. Press 2014); *see also generally* M. Roestoff, F. Haupt, H Coetzee & M Erasmus, “The Debt Counselling Process—Closing the Loopholes in the National Credit Act 34 of 2005,” 12 *P.E.R.* 247 (2009).
210. Kent Anderson, “Japanese Insolvency Law After a Decade of Reform,” 43 *Canadian Bus. L.J.* 2, 4 (2006); *see also id.* at 13 (noting that the Tokyo and Osaka District Courts have “divisions dedicated to insolvency matters that have gained significant expertise.”).
211. See Anderson, *above* note 184, at 363.
212. Oh, *above* note 129, at 621.
213. Ministry of Justice, *above* note 129, at 8.
214. See Skeel, *above* note 179, at 34-47, 168-70 (2001).
215. See *id.* at 229 (noting the rise of Delaware as a restructuring center in large part thanks to a cooperative judge).
216. www.worldbank.org/insolvency
217. Pages 71-84.
218. See, e.g., Jason J. Kilborn, “Determinants of Failure ... and Success in Personal Debt Mediation” *Transnat’l Disp. Mgmt.* (Winter 2017), transnational-dispute-management.com.
219. See, e.g., Sarra, *above* note 77, at 46, 49 (noting the difficulty or impossibility of effectively distinguishing personal from business debt in the MSME context).

An open notebook with lined pages lies on a wooden desk. The word "References" is written in a large, bold, black, handwritten-style font across the center of the notebook. Surrounding the notebook are various items: a black pen, a green pen, a clear stapler, a yellow sticky note, and a dark green object (possibly a water bottle or container) in the background. A portion of a black smartphone is visible on the left edge.

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